TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 394

ROBERTA WELLS, AS ADMINISTRATRIX OF THE ESTATE OF CREEK WELLS, PETITIONER,

vs.

SIMONDS ABRASIVE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 21, 1952

CERTIORARI GRANTED OCTOBER 13, 1952

SUPREME COURT OF THE UNITED STATES

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No. 394

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vs.

SIMONDS ABRASIVE COMPANY

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[fol. a] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 10,549

ROBERTA WELLS, as Administratrix of the Estate of CHEEK WELLS, Appellant,

vs.

SIMONDS ABRASIVE COMPANY

Appendix to Brief for Appellant

[fol. 1] DOCKET ENTRIES

1. April 19, 1950, Complaint filed. April 19, Summons exit. April 19, Plaintiff's demand for jury trial filed.

2. May 1, Appearance of Charles J. Biddle, Esq. as Co-counsel for plaintiff filed.

3. May 10, Appearance of Philip Price, Esq. for defendant filed.

4. May 10, Answer filed.

5. May 16, Summons returned "on April 21, 1950 served" & filed.

6. July 11, Order to place case on trial list filed.

7. Aug. 8, Plaintiff's Interrogatories filed.

8. Aug. 15, Defendant's objections to plaintiff's interrogatories & notice filed.

9. Nov. 1, Order of Court re: objections to interrogatories, filed 11/2/50 Noted & Notice Mailed.

10. March 1, 1951, Defendant's motion for security for costs & notice of motion filed.

11. March 21, Defendant's notice of taking depositions of plaintiff filed.

12. March 21, Defendant's answers to interrogatories filed.

13. April 10, Affidavit of Plaintiff for leave to sue in forma pauperis filed.

14. April 20. Order vacating defendant's notice to produce plaintiff for depositions upon oral examination in Philadelphia, and directing that if such deposition is taken, it shall be upon 15 days' written notice at Anniston, Alabama, etc. filed 4/23/51 Noted & Notice mailed.

15. April 25, Defendant's motion for Summary Judgement filed.

16. April 25, Order to place the above motion on Argument list, filed.

17. May 2, Order of Court permitting plaintiff to proceed in forma pauperis filed—Noted & notice mailed 5-3-51.

May 21, Hearing sur defendant's Motion for Summary Judgment C.A.V. (Transferred to Judge Kirkpatrick on briefs).

18. July 25, 1951, Opinion, Kirkpatrick, J. granting judgment for defendant filed.

19. July 25, Judgment in favor of defendant with costs, filed 7/26/51 Noted & notice mailed.

20. Aug. 17, Plaintiff's notice of Appeal, filed. Copy to P. Price, Esq.

21. Aug. 17, Copy of Clerk's notice to U. S. Court of Appeals filed.

Sept. 11, Original Record transmitted to U.S. Court of Appeals.

[fol. 2] IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed April 19, 1950

The plaintiff, Roberta Wells as administratrix of the Estate of Cheek Wells, complaining of the defendant, Simonds Abrasive Company, a corporation, alleges as follows:

Count One

1. Plaintiff is a resident of the State of Alabama, and has been duly appointed as administratrix of the estate of Cheek Wells, deceased, by the Probate Court of Calhoun County, Alabama. The defendant is a corporation having its principal place of business in Philadelphia, Pennsylvania. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

2. Plaintiff claims of the defendant the sum of Fifty Thousand Dollars ($50,000.00) as damages for that to-wit, the 19th day of April, 1948, the defendant was engaged in the business of manufacturing or assembling emory or

grinding wheels which said emory or grinding wheels were sold or distributed to various wholesalers and dealers to be sold by them to the general public; that prior to to-wit, April 18, 1948, the defendant sold to Wimberly and Thomas of Birmingham, Alabama, in the due course of trade, an emory or grinding wheel which the said Wimberly and Thomas subsequently sold, in the due course of trade, to Peerless Pipe and Foundry Company of Anniston, Alabama, for use as a grinding wheel. Plaintiff avers that said emory or grinding wheel was not reasonably safe for use [fol. 3] as a grinding wheel but on the contrary was imminently dangerous when used for said purpose. Plaintiff avers that such danger was known to the defendant or by the exercise of reasonable diligence should have been so known. And plaintiff avers that said emory or grinding wheel was so defectively constructed that while the plaintiff's intestate who was an employee of the Peerless Pipe and Foundry Company of Anniston, Alabama, was using said grinding wheel for the purpose of grinding fittings one of the purposes for which the said wheel was manufactured the said emory or grinding wheel disintegrated or came to pieces while being turned on a lathe and a segment thereof struck plaintiff's intestate on his head proximately causing his death.

And plaintiff avers that the said damages aforesaid were a proximate result of the negligence of the defendant as aforesaid.

Whereas, plaintiff demands (1) damages in the sum of $50,000.00 (2) that plaintiff have judgment against the defendant for costs.

Merrill, Merrill and Vardaman. By (S.) John W. Vardaman, P.O. Box 286, Anniston, Alabama, Attorneys for the plaintiff; (S.) Charles Douglas, Radio Building, Anniston, Alabama, Attorney for Plaintiff.

Plaintiff demands a trial by jury.

(S.) John W. Vardaman, Of Counsel for Plaintiff.

[fol. 4] IN UNITED STATES DISTRICT COURT

DEFENDANT'S ANSWER TO COMPLAINT—Filed May 10, 1950

Defendant, Simonds Abrasive Company, in answer to the Complaint filed in the above case, avers:

First Defense

1. Defendant admits that it is a corporation having its principal place of business in Philadelphia, Pennsylvania. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 1 of the Complaint.

2. Defendant admits that prior to April 18, 1948, it was engaged in the business of manufacturing and selling grinding wheels and that prior to said date it occasionally sold its products to Wimberly and Thomas of Birmingham, Alabama. Defendant denies that any grinding wheel sold by it, either to Wimberly and Thomas or to any other purchaser, was not reasonably safe for use as a grinding wheel or was dangerous when so used or was defective in any respect whatever. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 2 of the Complaint.

Second Defense

3. Plaintiff's Complaint does not state a claim upon which relief can be granted against defendant.

Third Defense

4. Any right of action that plaintiff or anyone acting on behalf of Cheek Wells, deceased, might have had to recover damages for personal injuries to or the death of [fol. 5] Cheek Wells, deceased, is barred by the applicable statute of limitations.

Fourth Defense

5. The sole and proximate cause of any injuries that might have resulted in the death of Cheek Wells, deceased, at the time and place alleged in the Complaint was the negligence of Cheek Wells in the manner of performing the work in which he was then engaged.

Fifth Defense

6. Cheek Wells assumed the risk of any injuries sustained by him at the time and place averred in the Complaint.

Sixth Defense

7. Plaintiff is not entitled to maintain this action against defendant in this Court.

Seventh Defense

8. Under the law of the State of Alabama, plaintiff, or anyone acting on behalf of Cheek Wells, deceased, is not entitled to recover damages from defendant for any injuries that might have been suffered by or resulted in the death of Cheek Wells at the time and place and in the manner averred in the Complaint.

(S.) Philip Price, Attorney for Defendant.

[fol. 6] In United States District Court

Defendant's Motion for Summary Judgment—Filed April 25, 1951

Defendant, by its attorney, Philip Price, Esquire, moves the Court to enter a summary judgment in the defendant's favor dismissing the action on the ground that the right of action asserted by the plaintiff is barred by the Pennsylvania Act of April 26, 1855, P. L. 309, Sec. 2, 12 P. S. 1603, because it appears of record that the action was brought more than one year after the death of plaintiff's decedent on April 19, 1948.

(S.) Philip Price, Attorney for Defendant.

[fol. 7] IN UNITED STATES DISTRICT COURT

OPINION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before Kirkpatrick, Ch. J.

The plaintiff is the widow and administratrix of one, Cheek Wells, who was killed on April 19, 1948, when an emory wheel manufactured by the defendant, with which he was working, burst. The accident and death occurred in Alabama.

This action for damages was commenced in this court by the plaintiff, in her capacity as administratrix, on April 19, 1950, more than one year, but within two years, after the death. The plaintiff's right to sue arises under Title 7, Sec. 123 of the 1940 Code of Alabama which provides that the personal representative may bring an action for injuries causing the death of his decedent within two years after the death. However, the action being a diversity suit, this Court is bound to apply the conflict of laws rule of the State of Pennsylvania and by that rule the limitation of the Alabama statute has no controlling effect (unless, as will be seen, the position of the plaintiff should be sustained). In Rosenzweig v. Heller, 302 Pa. 279, 285, the Supreme Court of Pennsylvania held, broadly, that "a statute of limitation of the state of the forum controls the action." The Court said "Statutes of limitation should operate equally upon litigants seeking relief in our courts, upon those invoking remedies here for causes of action originating elsewhere, [fol. 8] the same as upon those whose rights arise directly in our Commonwealth."

Pennsylvania has two statutes providing for recovery of damages where death results from a wrongful injury—a death statute (the Act of 1855) with a one year limitation and a survival statute (the Act of 1937) with a two year limitation—but the only question here is whether the limitation of the Act of 1855 applies, or that of the Alabama statute. The answer depends upon the nature of the cause of action created by the Alabama statute, upon which the plaintiff's suit is grounded. The plaintiff contends that her cause of action is not the same as that created by the Pennsylvania Act of 1855, that, therefore, the rule of Rosenzweig vs. Heller, supra, does not apply and, there being no

comparable Pennsylvania statute, the limitation of the Alabama Act must govern.

I can agree with the plaintiff that the Alabama Homicide Act differs widely from the Pennsylvania Act of 1855. The measure of damages is entirely different and the parties who will benefit will be, in many cases, quite different, but the problem cannot be solved by laying the two statutes side by side and checking the various points of similarity or dissimilarity.

In Rosenzweig vs. Heller, supra, the Court was dealing with the New Jersey statute, which was a true death statute, and in laying down the rule, the Court was referring to [fol. 9] death statutes generally. The Restatement, Conflict of Laws, Sec. 433, which the Court quoted in support of its decision spoke broadly of a "death statute", and it is plain that the Court did not intend that the general policy announced by it should apply only to actions under foreign statutes having all the characteristics of the Pennsylvania Act of 1855.

The only question is whether the Alabama Act is a death statute, and I have no doubt that it is. It is, of course, obviously a punitive statute, at least so far as the defendant is concerned, but in all true death statutes, beginning with Lord Campbell's Act, the imposition upon a wrongdoer of civil liability for causing the death of another was basically a punitive concept. The injury which caused the death of this decedent may have created a right of action in him, but that right the Alabama statute does not pretend to keep alive. It is some wrongful act resulting in death which generates the cause of action. In Parker v. Fies & Sons, 243 Ala. 348, 10 So. 2d 13, the Court said "Our Homicide Act is a death statute, a punitive statute to prevent homicide. It creates a distinct cause of action, unknown at common law. The cause of action comes into being only upon death from wrongful act . . . Death resulting from the wrongful act is of the essence of the cause of action; the event giving rise thereto." The Alabama statute re- [fol. 10] sembles the Pennsylvania survival statute only in the party empowered to bring the suit and in the beneficiaries who share in the recovery, but that is superficial. The essential nature of the right of action created by the Alabama statute would have been exactly the same as it is now

had some public official been designated as the party to bring the suit and the amount assessed by the jury gone to the State.

Judgment may be entered for the defendant.

[fol. 11] Order granting leave to proceed in forma pauperis (omitted in printing).

[fols. 12-14] In United States District Court

No. 10,549

Roberta Wells, as Administratrix of the Estate of Cheek Wells, Appellant,

vs.

Simonds Abrasive Company

Appendix to Brief for Appellee

[fol. 15] In United States District Court

Defendant's Answers to Interrogatories

Defendant, Simonds Abrasive Company, makes the following answers to plaintiff's interrogatories in accordance with the order of the Court entered on November 1, 1950:

1. (a) Defendant has been so informed but does not know of its own knowledge whether any grinding wheel involved in the fatal accident to Cheek Wells was manufactured or constructed by it. Defendant is advised that such information would be available from employees of Peerless Pipe & Foundry Co., Anniston, Alabama. Defendant is advised further that the investigation file pertaining to said accident was originally made available to and was used by John W. Vardaman, of counsel for plaintiff, who then represented the insurance carrier for Peerless Pipe & Foundry Co. in the defense of a compensation claim by the present plaintiff arising out of the same accident, and that said John W. Vardaman thereafter changed sides and became counsel for the plaintiff and not only retained posses-

sion of said file but subsequently utilized it in the preparation of plaintiff's case against defendant.

* * * * * * *

IN UNITED STATES DISTRICT COURT

STATUTES REFERRED TO IN APPELLEE'S BRIEF

PENNSYLVANIA STATUTES

WRONGFUL DEATH ACT

Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives may maintain an action for and recover damages for the death thus occasioned. (Act of April 15, 1851, P. L. 669, § 19, 12 P. S. § 1601.)

[fol. 16] The persons entitled to recover damages for any injuries causing death shall be the husband, widow, children, or parents of the deceased, and no other relatives; and that such husband, widow, children or parents of the deceased shall be entitled to recover, whether he, she or they be citizens or residents of the Commonwealth of Pennsylvania, or citizens or residents of any other State or place subject to the jurisdiction of the United States, or of any foreign country, or subjects of any foreign potentate; and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without liability to creditors under the laws of this Commonwealth. If none of the above relatives are left to survive the decedent, then the personal representative shall be entitled to recover damages for reasonable hospital, nursing, medical, funeral expenses, and expenses of administration necessitated by reason of injuries causing death. (Act of April 26, 1855, P. L. 309, § 1; Act of June 7, 1911, P. L. 678, § 1; as amended Act of April 1, 1937, P. L. 196, § 1, 12 P. S. (Supp.) § 1602.)

The declaration shall state who are the parties entitled in such action; the action shall be brought within one year

after the death, and not thereafter. (Act of April 26, 1855, P. L. 309, § 2, 12 P. S. § 1603.)

SECTION 35(a) OF THE FIDUCIARIES ACT OF 1917

No personal action hereafter brought, except actions for slander and for libels, and no action for mesne profits or for trespass to real property, shall abate by reason of the death of the plaintiff or the defendant, or by reason of the death of one or more joint plaintiffs or defendants; but the executor or administrator of the deceased party may be substituted as plaintiff or as defendant, as the case may be, and the suit prosecuted to final judgment and satisfaction. (Act of June 7, 1917, P. L. 447, § 35(a); Act of March 30, 1921, P. L. 55, § 1, 20 P. S. Ch. 3, App. § 771.)

[fol. 17] ACT OF JULY 2, 1937

Executors or administrators shall have power, either alone or jointly with other plaintiffs, to commence and prosecute all actions for mesne profits or for trespass to real property, and all personal actions which the decedent whom they represent might have commenced and prosecuted, except actions for slander and for libels; and they shall be liable to be sued, either alone or jointly with other defendants, in any such action, except as aforesaid, which might have been maintained against such decedent if he had lived.

All such rights of action which were not barred by the statutes of limitation at the time of the death of decedent may be brought against his executors or administrators at any time within one year after the death of the decedent, notwithstanding the provisions of any statutes of limitations whereby they would have been sooner barred. (Act of June 7, 1917, P. L. 447, § 35(b); Act of March 30, 1921, P. L. 55, § 1; Act of May 2, 1925, P. L. 442, § 1; Act of July 2, 1937, P. L. 2755, § 2, 20 P. S. Ch. 3, App. § 772.)

ALABAMA STATUTES

HOMICIDE ACT

Action for wrongful act, omission, or negligence causing death. A personal representative may maintain an action,

and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence, if it had not caused death. Such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be maintained, [fol. 18] though there has not been prosecution, or conviction, or acquittal of the defendant for the wrongful act, or omission, or negligence; and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions. Such action must be brought within two years from and after the death of the testator or intestate. (Tit. 7, Code of Ala. 1940, § 123.)

Survival Acts

All actions on contracts, express or implied; all personal actions, except for injuries to the reputation, survive in favor of and against the personal representatives. (Tit. 7, Code of Ala. 1940, § 150.)

No action abates by the death or other disability of the plaintiff or defendant, if the cause of action survive or continue; but the same must, on motion, within twelve months thereafter, be revived in the name of or against the legal representative of the deceased, his successor or party in interest; or the death of such party may be suggested upon the record, and the action proceed in the name of or against the survivor. (Tit. 7, Code of Ala. 1940, § 153.)

Minnesota Statutes

Wrongful Death Act

Action for death by wrongful act. Whenever death is caused by the wrongful act or omission of any person or corporation, the personal representative of the decedent may maintain an action therefore, if he might have maintained an action, had he lived, for an injury caused by the

same act or omission. The action may be commenced within two years after the act or omission. The damages therein cannot exceed $10,000, and shall be for the exclusive benefit of the surviving spouse and next of kin, to be distributed to them in the same proportion as personal property of [fol. 19] persons dying intestate; but funeral expenses and any demand for the support of the decedent other than old age assistance, duly allowed by the probate court, shall first be deducted and paid. If an action for such injury shall have been commenced by such decedent, and not finally determined during his life, it may be continued by his personal representative for the benefit of the same persons and for recovery of the same damages as herein provided, and the court on motion may make an order, allowing such continuance, and directing pleadings to be made and issues framed conformably to the practice in action begun under this section. (Minn. Stat. Ann., § 573.02.)

[fols. 20-22] COMPARISON OF PENNSYLVANIA, MINNESOTA, AND ALABAMA WRONGFUL DEATH ACTS

	Pennsylvania Act	*Minnesota Act*	*Alabama Act*
Basis of Liability	By express provision: "Whenever death shall be occasioned by unlawful violence or negligence . . ."	By express provision: "Whenever death is caused by the wrongful act of any person . . ."	By express provision: ". . . the wrongful act, omission or negligence of any person . . . whereby the death . . . was caused . . ."
Party entitled to bring suit	By rule of Court since 1939: Personal representative. Pa. R. C. P. 2202(a).	By express provision: Personal representative.	By express provision: Personal representative.
Availability of defenses good against decedent	No express provision; such defenses generally available by interpretation only: *Valente v. Lindner*, 340 Pa. 508, 17 A. 2d 371 (1941); *Hill v. Pennsylvania R. Co.*, 178 Pa. 223, 35 Atl. 997 (1896); *Howard v. Bell Tel. Co.*, 306 Pa. 518, 160 Atl. 613 (1932).	Such defenses generally available by express provision and interpretation. "if (decedent) might have maintained an action . . . for an injury caused by the same act or omissions" *Geldert v. Boehland*, 200 Minn. 332, 274 N.W. 245 (1937).	Such defenses generally available by express provision and interpretation: "if (decedent) . . . could have maintained an action for such wrongful act, omission or negligence if it had not caused death" *Breed v. Atlanta B. & C. R. Co.*, 241 Ala. 640, 645, 4 So. 2d 315, 319 (1942); compare, *Kaczorowski v. Kalkosinski*, 321 Pa. 438, 440, 184 Atl. 663, 664 (1936).
Beneficiaries	By express provision: "husband, widow child or parents."	By express provision: "surviving spouse and next of kin"	By express provision: statutory distributees under the statute of distributions, i.e. intestacy law.
Measure of Damages	By interpretation: pecuniary loss of beneficiaries. *Ferne v. Chadderton*, 363 Pa. 191, 197, 69 A. 2d 104 (1949).	By interpretation: pecuniary loss of beneficiaries with statutory maximum of $10,000. *Holz v. Pearson*, 229 Minn. 395, 39 N.W. 2d 867 (1950).	By interpretation: punitive damages. *Parker v. Fies & Sons*, 243 Ala. 348, 349, 10 So. 2d 13, 14 (1942).
Distribution	By express provision: as personal property under intestacy.	By express provision: as personal property under intestacy.	By express provision: according to the statute of distributions, i.e. intestacy law.
Freedom from creditors' liens.	By express provision: not subject to liens.	By express provision: not subject to liens.	By express provision: not subject to liens.

[fol. 23-24] Petition for Leave to Proceed in Forma Pauperis—August 22, 1951—(Omitted in Printing)

[fols. 25-27] Order Granting Petition—Filed August 27, 1951—(Omitted in Printing)

[fols. 28-30] Stipulation Extending Time to October 25, 1951—(Omitted in Printing)

[fols. 31-33] Stipulation Extending Time to December 8, 1951—(Omitted in Printing)

[fols. 34-36] Stipulation Extending Time to December 24, 1951—(Omitted in Printing)

[fol. 37] In United States Court of Appeals for the Third Circuit

No. 10,549

Roberta Wells, as Administratrix of the Estate of Cheek Wells, Appellant,

v.

Simonds Abrasive Company, a Corporation

Appeal from the United States District Court for the Eastern District of Pennsylvania

Argued January 24, 1952

Before Kalodner and Staley, Circuit Judges and Stewart, District Judge

Opinion of the Court—Filed February 4, 1952

Per Curiam:

In a thoroughly considered opinion Chief Judge Kirkpatrick discussed the problem presented by this appeal in the light of the Pennsylvania and Alabama decisions.

We find ourselves in complete accord with his reasoning and conclusions. Judgment of the Court below, therefore, will be affirmed upon the opinion of Chief Judge Kirkpatrick. F. Supp.

[fol. 38] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,549

ROBERTA WELLS, as Administratrix of the Estate of Cheek Wells, Appellant,

vs.

SIMONDS ABRASIVE COMPANY

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: Kalodner and Staley, Circuit Judges, and Stewart, District Judge.

JUDGMENT—Filed February 4, 1952

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed with costs.

Attest:

Ida O. Creskoff, Clerk.

February 4, 1952.

[File endorsement omitted.]

[fols. 39-41] PETITION TO EXTEND TIME FOR FILING PETITION FOR REARGUMENT—February 14, 1952—(Omitted in Printing)

[fols. 42-43] ORDER EXTENDING TIME TO MARCH 5, 1952—(Omitted in Printing)

[fol. 44] IN UNITED STATES COURT OF APPEALS

[File endorsement omitted.]

[fol. 45] PETITION FOR REARGUMENT—Filed February 28, 1952

Comes now, Roberta Wells, as administratrix of the estate of Cheek Wells, appellant in the above entitled case, and presents this her petition for reargument before the court in banc and in support thereof respectfully shows:

1. Your honorable Court (Judges Kalodner, Staley and Stewart) on February 4, 1952 filed its opinion (Appendix 1) affirming Per Curiam the judgment of the United States District Court for the Eastern District of Pennsylvania upon the opinion of that Court (Appendix 2). By order of this Court, Goodrich, J., dated February 14, 1952, the time for filing this petition for reargument was extended to March 5, 1952. Permission was heretofore duly granted to petitioner to proceed in forma pauperis and for that reason this petition has not been printed.

2. The suit was for damages for the death of plaintiff's decedent on April 19, 1948, in Alabama, caused by a defectively constructed grinding wheel manufactured by defendant. The suit was brought on April 19, 1950, in Pennsylvania, where defendant has its principal place of business, defendant having no office or place of business in Alabama.

3. Title 7 Section 123 of the Alabama Code of 1940 (quoted in full Appendix 3) provides that a personal representative may bring an action and recover damages based on negligence causing the death of his intestate, if [fol. 46] the latter could have maintained such an action had he not died; the damages recovered not being subject to his debts and being distributed according to the statute of distributions, such action to be brought within two years after the death.

4. The Pennsylvania Act of July 2, 1937, P. L. 2755, amended the title of the Act of June 7, 1917 to include "the survival of causes of action and suits thereupon by or against fiduciaries" and reenacted clause (b) of Section 35 of said Act of 1917[1] as follows:

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[1] This Section 35(b) had been held unconstitutional on account of defective title in 1923, in the case of *Strain v.*

"(b) Executors or administrators shall have power, either alone or jointly with other plaintiffs, to commence and prosecute all actions for mesne profits or for trespass to real property, and all personal actions which the decedent whom they represent might have commenced and prosecuted, except actions for slander, and for libels; . . ."

5. In *Stegner v. Fenton*, 351 Pa. 292 (1945) the Supreme Court held that the limitation period under the Act of 1937 was two years, this being the period fixed by the Act of June 24, 1895, P.L. 236, Section 2, for actions for personal injuries, as originally set forth in the Act of March 27, 1713, P. L. 76. [fol. 47] In that case, as in the case at Bar, the defendant contended that the Act of 1855 barred any suit after one year. This argument was rejected by the Court as follows (p. 296):

"The Acts have consistently applied the one year limitation *exclusively* to those actions where suit is brought by the *surviving relatives* for wrongful death." (Emphasis supplied.)

In the present case the suit was brought, in accordance with the Alabama statute, by plaintiff as decedent's personal representative, and *not* as the surviving relative.

6. It cannot be disputed that if, on April 19, 1950, plaintiff had brought this action, with service on the defendant, in Alabama, in the same form as the present suit, the action would have been in time under the Alabama statute and would have stated a valid cause of action. It has never been our contention, and is not now, that the limitation provision of the Alabama statute governs this case. We agree that the limitation provisions of the forum are controlling and rely on the Alabama statute merely to show that the

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Kern, 277 Pa. 209. The case of *Rosenzweig v. Heller*, 302 Pa. 279, relied on by Judge Kirkpatrick, was decided in 1931 between the decision of *Strain v. Kern* and the reenactment of the provisions in the Act of 1937.

The provision above quoted was incorporated in Sections 601 and 603 of the Fiduciaries Act of April 18, 1949, P.L. 512, 541, 542; 20 P.S. Sections 320.601 and 320.603.

plaintiff has a valid claim under Alabama law from which she would not have been barred in a suit brought by her in Alabama.

7. Nor can it be disputed that if the accident had happened in Pennsylvania, plaintiff, as the personal representative of her husband's estate, could have brought an action in Pennsylvania on April 19, 1950, under the Act of 1937, above quoted, and that such action would have been timely and valid.

8. If the Act of 1937 were the only Act in Pennsylvania [fol. 48] permitting a suit to recover damages for a negligent act causing death, there could be no question that, under the decisions, the two-year limitation period which the Supreme Court has held applicable to suits under the Act of 1937, would apply to the suit based on negligence in Alabama.

9. The mere fact that there is also in Pennsylvania the Act of April 26, 1855, P.L. 309, permitting suits for negligent acts causing death by the husband, widow, children or parents of the deceased, and providing a one-year limitation for such suits, *under that Act* is immaterial to the present case.

10. Nor would the case be any different if instead of one Act of 1855, there were four different Acts, one giving a right of action to the husband, another to the widow, another to the children and a fourth to the parent, with respective limitation periods of six, nine, twelve and eighteen months.[1] The fact that Pennsylvania contains a statute permitting a suit by the personal representative and providing a two-year limitation in such a case demonstrates conclusively [fol. 49] that there is no public policy in Pennsylvania against the maintenance of such a suit during the period of two years.

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[1] All such rights of action would be based on one and the same cause of action, *the negligent act causing death*; likewise, the rights of action under the Alabama law and the Pennsylvania Act of 1937 are based on the identical cause of action. See *Fisher v. Hill*, 368 Pa. 53, 58, 59 (1951).

11. In Judge Kirkpatrick's opinion, which was affirmed per curiam by this Court, he said:

> ". . . the only question here is whether the limitation of the Act of 1855 applies, or that of the Alabama statute . . . The plaintiff contends that her cause of action is not the same as that created by the Pennsylvania Act of 1855, that, therefore, the rule of Rosenzweig vs. Heller, supra, does not apply and, there being no comparable Pennsylvania statute, the limitation of the Alabama Act must govern."

12. In thus stating the question involved, Judge Kirkpatrick entirely misunderstood the real point in the present case, as he further did in relying on the decision in *Rosenzweig v. Heller*, 302 Pa. 279, which was decided in 1931,[1] prior to the amendment of 1937 on which we rely in this case. In 1931 the *only* act permitting recovery for a negligent act causing death was the Act of 1855, which provides a one-year limitation.

13. Nor does it in the least matter whether the Act of [fol. 50] 1855 or the Act of 1937 are spoken of as Death Statutes, or as Survival Statutes.[2] Section 35(b) of the

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[1] In the above case the Supreme Court said, at page 258:

> "Statutes of limitation should operate equally upon litigants seeking relief in our courts, upon those invoking remedies here for causes of action originating elsewhere, the same as upon those whose rights arise directly in our Commonwealth."

[2] As the Court pointed out in *Strain v. Kern*, 277 Pa. 209, 212 (1923) the only true survival statute in Pennsylvania is Section 35(a) of the Fiduciaries Act of 1917, P. L. 447, which permits the personal representative of a decedent to carry on after the decedent's death an action which he had instituted during his lifetime. As the Court put it (p. 212):

> ". . . for 'survival' implies something existing which is to survive, and 'substitution of executors and administrators therein' can only refer to a suit brought

Act of 1937 specifically authorizes an administratrix to commence and prosecute an action for personal injuries which her decedent might have prosecuted, as does the Alabama statute. See *Stegner v. Fenton*, 351 Pa. 292. The fact remains that this Act of 1937 conclusively demonstrates the policy of Pennsylvania to be to allow two years for the administrator of one killed by the wrongful act of another to bring suit in Pennsylvania to recover damages for the benefit of his estate and heirs, irrespective of where the accident occurs; which is all we have to know for the purpose of this case.

[fol. 51] 14. Judge Kirkpatrick's decision was to the effect that the personal representative of a man killed in Alabama should have sued in Pennsylvania within one year from the death, whereas two years would have been allowed had the accident occured in Pennsylvania and two years would have also been allowed had service been obtainable in Alabama. As applied to the case at Bar this is equivalent to holding that the plaintiff, compelled to seek out the defendant in Pennsylvania, had no claim at a time when if the accident had happened here or if the suit could have been brought in Alabama, recovery would have been permitted. This was precisely what the Supreme Court of the United States said in *Hughes v. Fetter*, 71 S. Ct. 980 (1951), might not be done. In that case the Supreme Court of Wisconsin had sustained a Wisconsin statute permitting suits for wrongful death occurring within that state, but denying all remedy in the Wisconsin courts for death in an accident occurring outside of Wisconsin. The Supreme Court held that this statute violated the Full Faith and Credit Clause of the Constitution. The majority said:

> "It [the Supreme Court of Wisconsin] held that a Wisconsin statute, which creates a right of action only for deaths caused in that state, establishes a local public policy against Wisconsin's entertaining suits

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by a decedent, in which, because of his death, the names of his personal representatives are to be substituted."

Section 123 of the Alabama Code, above cited, provides for a direct suit by the personal representative where the decedent has not already brought any action.

brought under the wrongful death acts of other states." (p. 981)

"We hold that Wisconsin's policy must give way. That state has no real feeling of antagonism against wrongful death suits in general. To the contrary, a forum is regularly provided for cases of this nature, [fol. 52] the exclusionary rule extending only so far as to bar actions for death not caused locally." (p. 982)

Since, under the Act of 1937, Pennsylvania permits the bringing of a suit by the personal representative for the death of the decedent by negligent act within two years if the accident occurs in Pennsylvania, it is obligated under *Hughes v. Fetter*, supra, to permit the bringing of such an action in Pennsylvania within the same period where the accident occurs in another state and is permitted by the statutes of that state. It would be unconstitutional for Pennsylvania to bar this suit by using the limitation provision of another statute under which the suit was *not* brought.

15. The decision of this Court in *Hughes v. Lucker*, 174 F. (2d) 285 (1949), while in point, should not be controlling here, since, as the opinion and briefs will show, it was rendered without consideration of the Act of 1937, just as was the case at Bar.[1]

16. While the present case is of vital importance to the plaintiff, who has been denied relief solely because she was [fol. 53] compelled to sue the defendant in Pennsylvania, it is also important generally in similar situations frequently arising, including one case now pending on appeal to this Court, *Quinn v. Simonds Abrasive Company*, No. 10,641, from the Eastern District of Pennsylvania under a

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[1] In the above case, referring to *Rosenzweig v. Heller*, this Court said that that case established the "rule of policy" for Pennsylvania and that "no action for a death by wrongful act can be brought in Pennsylvania after the one year period has expired." The Court made this statement without realizing that the Act of 1937 had clearly altered the policy of Pennsylvania thereafter to permit actions to be brought by the personal representative to recover damages for the decedent's death up to two years.

decision by Judge Welsh, holding that an action in Pennsylvania on an Ohio accident was timely under Section 35(b) of the Act of 1937 when brought within two years but more than one year after the death. This is precisely contrary to the decision by Judge Kirkpatrick in the case at Bar. Appellant's brief in the Quinn case is due in this Court on March 6th, one day after that fixed for the filing of the present petition for reargument. Inasmuch as this Court will then be required to reconsider this question, it is but fair that the plaintiff in the present case should have the benefit of such reconsideration.

Respectfully submitted, Henry S. Drinker, Charles J. Biddle, Attorneys for Appellant.

[fol. 54] [Opinion of the Court Omitted. Printed side page, 37, ante.]

[fols. 55-58] [Opinion of the District Court Omitted. Printed side page, 7, ante.]

[fols. 59-60] [Alabama Code of 1940, Title 7, Section 123: Omitted. Printed side page, 17 ante.]

[fol. 61] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

[Title omitted]

[fol. 62] APPELLEE'S ANSWER TO APPELLANT'S PETITION FOR REARGUMENT—Filed March 5, 1952

Appellant's petition for reargument clearly shows that the Appellant still does not understand the legal questions involved in this case; and thus on page 9 she states that Judge Welsh's Opinion in the *Quinn* case "is precisely contrary to the decision by Judge Kirkpatrick in the case at Bar." Actually Judge Welsh followed precisely the same

principles which formed the basis of Judge Kirkpatrick's decision, and so dismissed so much of the cause of action in the *Quinn* case as arose under the Ohio Wrongful Death Statute and preserved that portion of it which arose under the Ohio Survival Statute (Appellee's Brief, pp. 11, 12), thus giving effect to the distinction so clearly marked by the Pennsylvania decisions and which Appellant persistently refuses to recognize.

Only by closing her eyes to the Pennsylvania cases, many of which are cited and discussed on pages 7 to 11 of Appellee's Brief, could Appellant state, as she does in paragraph 13 of her petition for reargument, that it does not "matter whether the Act of 1855 or the Act of 1937 are spoken of as Death Statutes, or as Survival Statutes." In such a statement Appellant is still merely attempting to juggle words, as she did in her original briefs.

In saying, as she does at the top of page 8 of her petition, that a suit for death by negligent act may be brought "within two years if the accident occurs in Pennsylvania," Appellant fails to note the important qualification that it is a survival action alone that may be brought within two years, whereas a death action must be brought within one year. Thus, since the Alabama law authorizes only a death action and, unlike that of Ohio or Pennsylvania, furnishes no basis for a survival action, it is quite inaccurate to state [fol. 63] generally, as Appellant does at the top of page 7 of her petition, that "two years would have been allowed had the accident occurred in Pennsylvania." Two years would have been allowed for a *survival action* had the accident occurred in Pennsylvania, but only one year would have been allowed for a *death action* had the accident occurred in Pennsylvania. Since a death action is the only right of action created by the Alabama Statute, that is the only right of action that may be asserted anywhere, either within Alabama or without, and Judge Kirkpatrick was accordingly bound by the Pennsylvania law to apply the one-year period of limitation to the present action. In *Parker v. Fies & Sons*, 243 Ala. 348 (1942), 10 So. 2d 13, 14, referred to on pages 18 and 19 of Appellee's Brief, the Alabama Supreme Court said:

> "The statute providing for survival of actions for 'injuries to the person' does not apply to actions for

injuries from wrongful act resulting in death, with a consequent right of action under the Homicide Act. The survival statute has a field of operation in actions where death ensues from other causes. The lawmakers did not contemplate two actions by the same administrator against the same defendant for the same tort, prosecuted to separate judgments, one to recover for personal injuries for the benefit of the estate, and another for punitive damages for the benefit of next of kin."

It is only by ignoring the distinction between death actions and survival actions in the Alabama law as well as in the Pennsylvania law that Appellant may delude herself into thinking that it is immaterial whether the applicable act be called a Death Statute or a Survival Statute.

Since paragraph 16 of Appellant's petition makes it clear that she merely wants to delay the ultimate decision of this case until decision of the *Quinn* case, in the hope [fol. 64] that the Court may perhaps reach conflicting conclusions, it is submitted that the petition for reargument should be denied.

Respectfully submitted, Philip Price, Robert M. Landis, Attorneys for Appellee.

Barnes, Dechert, Price, Myers & Rhoads, Of Counsel.

[fol. 65] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,549

ROBERTA WELLS, as Administratrix of the Estate of CHEEK WELLS, Appellant,

v.

SIMONDS ABRASIVE COMPANY, a Corporation

Appeal from the United States District Court for the Eastern District of Pennsylvania

Argued January 24, 1952

Before Kalodner and Staley, Circuit Judges, and Stewart, District Judge

OPINION OF THE COURT ON PETITION FOR REHEARING—Filed March 26, 1952

PER CURIAM:

The petition for rehearing is premised on an entirely erroneous conception of Section 2 of the Act of July 2, 1937, P. L. 2755, known as the Survival Act.[1]

According to plaintiff's view " . . . the present remedy for wrongful death stems from the Act of 1937, which gives the major remedy, namely, the right on the part of the de- [fol. 66] ceased's estate to recover all his life was reasonably worth."[2]

The Supreme Court of Pennsylvania has explicitly ruled to the contrary and has held that the Acts of 1851 and 1855, known as the Death Acts[3] alone make recoverable the type of damages described by the plaintiff. Kaczorowski v. Kalkosinki, 321 Pa. 438 (1936); Pezzulli v. D'Ambrosia, 344

[1] The Act is now incorporated in Sections 601 and 603 of the Fiduciaries Act of 1949.

[2] Page 22, Brief for Appellant.

[3] Act of April 15, 1851, P. L. 669, Sec. 19, as amended by the Act of April 26, 1855, P. L. 309, Sec. 1.

Pa. 643 (1942); Stegner v. Fenton, 351 Pa. 292 (1945). In the latter two cases the Court clearly distinguished the nature of actions under the Death Acts of 1851 and 1855 and the Survival Act of 1937 and pointedly stated in Stegner v. Fenton, supra, (page 295) "By no stretch of imagination can the provisions of that act (the Act of 1855) be grafted upon the 'survival' Act of 1937, supra, which was passed for an entirely different purpose. The Acts of 1851 and 1855, supra, are 'death' statutes, not 'survival' acts."

In Pezzulli v. D'Ambrosia, supra, the Supreme Court also stressed the fact, at page 647, that actions under the Death and Survival Acts "are entirely dissimilar in nature"; under the Death Act the cause of action ". . . is for the benefit of certain enumerated relatives of the person killed by another's negligence; the damages recoverable are measured by the pecuniary loss occasioned to *them* through deprivation of the part of the earnings of the deceased which they would have received from him had he lived."; and that the cause of action under the Survival Act "merely continues in his personal representatives the right of action which accrued to the deceased at common law because of the tort; the damages recoverable are measured by the pecuniary loss occasioned to *him*, and therefore to *his estate* by the negligent act which caused his death."

[fols. 67-68] It is crystal clear that the Alabama statute upon which the plaintiff relies as a basis for recovery is a true death statute as was held by the learned District Court Judge and furnishes no basis for an action within the scope of the Survival Act of 1937. What the plaintiff is seeking to do here is precisely what the Supreme Court of Pennsylvania said could not be done.

For the reasons stated the petition for rehearing will be denied.

[fol. 69] IN UNITED STATES COURT OF APPEALS

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed March 26, 1952

After due consideration the petition for rehearing in the above entitled case is hereby denied.

Attest:

Ida O. Creskoff, Clerk.

Dated March 26, 1952.

[File endorsement omitted.]

[fol. 70] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 71-75] IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 394

Petition for Leave to Proceed in Forma Pauperis and affidavit in support thereof (omitted in printing).

[fol. 76] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 52 Misc.

[Title omitted]

ORDER GRANTING CERTIORARI—October 13, 1952

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby,

granted limited to question No. 2 presented by the petition for the writ. The case is transferred to the appellate docket as No. 394.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 394

ROBERTA WELLS, AS ADMINISTRATRIX OF THE ESTATE OF CHEEK WELLS,

Petitioner,

vs.

SIMONDS ABRASIVE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952.

No. 394

ROBERTA WELLS, AS ADMINISTRATRIX OF THE ESTATE OF CHEEK WELLS,

Petitioner,

vs.

SIMONDS ABRASIVE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court for the Eastern District of Pennsylvania (R. 6) is reported at 102 F. Supp. 519 (1951). The per curiam opinion of the Court of Appeals for the Third Circuit (R. 14) and the further per curiam opinion of that Court (R. 25) on petition for rehearing are reported together at 195 F. (2) 814 (1952).

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on February 4, 1952. A petition for rehearing (R. 16) was duly filed, and was denied by per curiam opinion and order dated March 26, 1952. The petition for a writ of certiorari, together with a petition for leave to proceed in forma pauperis, were filed on June 21, 1952. Both petitions were granted on October 13, 1952 (R. 27). The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

Question Presented

An Alabama statute gives to the personal representative of one killed by negligent act in Alabama a direct right of action, with a two-year statute of limitations. A Pennsylvania statute gives a similar direct right of action to the personal representative of one killed by negligent act in Pennsylvania, also with a two-year limitation. In an action under the Alabama statute by the personal representative of one killed by negligent act in Alabama, brought in the United States District Court for the Eastern District of Pennsylvania, more than one year but less than two years after the death, the courts below held that the action by the Alabama personal representative was barred by the one-year statute of limitations of an earlier Pennsylvania Act which gives to the widow of one killed by negligent act in Pennsylvania a right of action in addition to that given to the personal representative. The question for determination by this Court is whether the application of the earlier Pennsylvania statute, as construed by the courts below, violates the Full Faith and Credit Clause of the United States Constitution.

Statutes Involved

Article IV, Section 1, of the Constitution of the United States;

Alabama Code of 1940, Title 7, Sections 123 and 150 (R. 10, 11); and the following Pennsylvania Acts:

1851, P. L. 699 (12 Purdon's Statutes, Sec. 1601) (R. 9);
1855, P. L. 309 (12 Purdon's Statutes, Sec. 1602) (R. 9);
1917, P. L. 447 (20 Purdon's Statutes, Sec. 771) (R. 10);
1937, P. L. 2755 (20 Purdon's Statutes, Sec. 772) (R. 10).

Statement of the Case

This action was by petitioner, a resident of Alabama, in her capacity as administratrix of the estate of her husband, to recover damages for the negligence of respondent in Alabama causing his death there, on April 19, 1948, by the bursting of a grinding wheel manufactured by respondent. Respondent having no office in Alabama, petitioner necessarily brought this suit (based on diverse citizenship) in the District Court at Philadelphia, respondent's principal place of business, on April 19, 1950, within two years but more than one year after decedent's death. The petitioner's suit, founded on the Alabama statute, was dismissed on the basis of an interpretation of the law of Pennsylvania, which violates the Full Faith and Credit Clause of the Constitution of the United States.

Title 7, Section 123, of the Alabama Code of 1940 (R. 10) provides that "a personal representative may maintain an action, and recover such damages as the jury may assess . . . for the wrongful act, omission or negligence of any person . . . whereby the death of his testator or intestate was caused, if the testator or intestate could have main-

tained an action for such wrongful act, omission, or negligence, if it had not caused death," the action to be brought within two years of his death.

Under this provision petitioner, as administratrix, had a valid cause of action under Alabama law from which she would not have been barred if she had been able to bring the present suit in Alabama on the date she brought it in Pennsylvania.

At the time of decedent's death there were two Pennsylvania statutory provisions for the recovery of damages for the death of one who died before bringing suit.

1. Section 35(b) of the Fiduciaries Act of 1917, as amended by Section 2 of the Act of July 2, 1937, P. L. 2755, 20 Purd. Stat. Sec. 1601-2 (R. 10).[1] provides (as does Section 123 of the Alabama Code), that "executors or administrators shall have power . . . to commence and prosecute . . . all personal actions which the decedent whom they represent might have commenced and prosecuted, except actions for slander and for libels, . . ." As held by the Supreme Court of Pennsylvania, the limitation period of this right of action by the personal representative is two years from decedent's death. *Stegner v. Fenton*, 351 Pa. 292, 40 Atl. (2) 473 (1945).

2. Act of April 26, 1855, P. L. 309, Section 1, 12 Purd. Stat. Sec. 1602 (R. 9) (amending that of April 15, 1851, P. L. 669, Section 19) providing that where no suit has been brought by the injured party during his life an action may be brought within one year from decedent's death by the "husband, widow, children or parents of the deceased and no other relatives."

The District Court, in an opinion (R. 6) affirmed per curiam by the Court of Appeals, and based on a Pennsyl-

[1] The original Section 35(b) of the Act of 1917 had been declared unconstitutional because of a defective title, *Strain v. Kern*, 277 Pa. 209, 120 Atl. 818 (1923), which defect was corrected and the Section reenacted in 1937.

vania decision rendered prior to the Act of 1937,[2] held that although the Alabama Act "differs widely from the Pennsylvania Act of 1855," the Act of 1855 was a declaration of the policy of Pennsylvania to limit actions for death to one year, which controlled this case. The District Court further said that "the only question here is whether the limitation of the Act of 1855 applies, or that of the Alabama Statute." The Court thus ignored the later Pennsylvania Act of 1937, having the two-year limitation in actions commenced by a personal representative after the death of the decedent, both as the Pennsylvania statute most nearly resembling the Alabama statute on which this suit was based, and as indicating Pennsylvania policy with regard to the limitation periods proper in such statutes. It also ignored petitioner's contention that since the law of Pennsylvania, by Section 35(b) of the Act of 1937 gave the administratrix of a decedent killed in Pennsylvania a remedy available on April 19, 1950, it could not deny her a similar remedy in Pennsylvania merely because her decedent was killed in Alabama, without violating the Full Faith and Credit Clause of the Constitution of the United States.

Specification of Errors to Be Urged

The Court of Appeals erred in holding that the statutory suit by the administratrix of a man negligently killed in Alabama was brought too late in Pennsylvania, despite the fact that it would have been in time if brought in Alabama, and would also have been in time if brought in Pennsylvania had the accident occurred in that State.

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[2] *Rosenzweig* v. *Heller*, 302 Pa. 279, 153 Atl. 346 (1931). The question has not been passed on by the Supreme Court of Pennsylvania since passage of the Act of 1937.

Summary of Argument

The Alabama statute on which this suit is based contains a two-year limitation provision for suits by the administrator of one who has not brought suit before his death, which the Alabama court has held to be of the essence of the cause of action.

Under the Full Faith and Credit Clause this provision must be recognized by the Federal District Court in Pennsylvania, there being no public policy in Pennsylvania antagonistic or obnoxious to such recognition. The existence of the Pennsylvania Act of 1937, which gives a complete remedy for wrongful death in Pennsylvania and provides a two-year limitation, is conclusive of the absence of such antagonistic policy here, despite a one-year limitation provision in the earlier Act of 1855.

This case is ruled by the principles upon which were based both the majority, minority and concurring opinions in *Hughes* v. *Fetter*, 341 U. S. 609 (1951) and *First National Bank* v. *United Air Lines*, 342 U. S. 396 (1952). Those announced in the majority and concurring opinions are equally applicable here. The basis for the minority's dissent is not applicable here.

The fact that the two-year limitation provision in the Alabama statute is one of substantive right is particularly important since the 1948 Amendment by Congress to the Judicial Code, expressly including State statutes (Public Acts) with judgments (Judicial Proceedings) as entitled to "the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . from which they are taken."

ARGUMENT

In the petition for certiorari two questions were presented. The first was whether the courts below erred in

holding that (irrespective of the Full Faith and Credit Clause) the petitioner, whose suit as personal representative of the decedent would have been in time had she been able to obtain service on the respondent in Alabama and whose suit as personal representative would also have been in time had the accident occurred in Pennsylvania, was nevertheless barred by the shorter limitation of the earlier Pennsylvania statute of 1855 applying to suits by a husband, widow, children or parents. The second question was whether such interpretation of the Pennsylvania law by the courts below resulted in a violation of the Full Faith and Credit Clause of the United States Constitution.

This Court, in its order granting certiorari, specifically limited its agreement to review the case to the second question. It necessarily follows, therefore, that whether the courts below were right or wrong in their construction of the Pennsylvania law, is not here directly at issue. The question now before this Court is whether, assuming as correct the construction of the Pennsylvania law by the courts below, the dismissal of petitioner's suit involved a violation of the Full Faith and Credit Clause. If so, then the case must be reversed. We shall, therefore, proceed to discuss the Full Faith and Credit Clause question upon the assumption that the courts below were correct in their construction of the Pennsylvania law.

The Decision of the Court Below Denied Full Faith and Credit to the Alabama Statute

This suit was based on the Alabama statute giving a right of action by the personal representative of one killed by wrongful act in Alabama, and providing a limitation period of two years. The decision of the court below was that in a diversity case in Pennsylvania, the Federal Court was bound to apply the *lex fori* which they held was found

in the Pennsylvania Act of 1855, providing a one-year limitation for actions for wrongful death by a husband, widow, children or parents of the deceased, despite the Pennsylvania Act of 1937 which provides a complete remedy[3] for death through negligence by giving a right of action to the personal representatives of the deceased and allowing a limitation of two years, the same as that in the Alabama statute.

The position of petitioner is that the only possible justification for a refusal to apply the Alabama statute, with its two-year limitation, would have been the existence in Pennsylvania of a policy "concerning its peculiarly domestic affairs", contrary and obnoxious to that of Alabama; and that the Pennsylvania Act of 1937, with its two-year limitation applicable to suits for wrongful death occurring in Pennsylvania is conclusive against the existence of such contrary policy.

Article IV, Section 1, of the Constitution provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Pursuant to such authorization, by Act of Congress of May 26, 1790[4] Congress prescribed the manner in which "acts of the Legislature of any state" should be authenticated and the manner in which the "records and judicial proceedings" of its courts should be proved. However, in providing for the effect to be given to the State proceedings the Act of 1790 covered only "records and judicial

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[3] To the effect that the Act of 1937 allows a complete remedy, see *Murray* v. *P. T. Co.*, 359 Pa. 69, 58 Atl. (2) 323 (1948).

[4] 1 Stat. 122, as amended, 28 U. S. C., Section 1738.

proceedings" and did not specify the effect to be given to "acts of the Legislature" of the States, the final sentence of the Congressional provision being as follows:

> "And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

In several cases this Court had "suggested that under the Full Faith and Credit Clause a forum State might make a distinction between statutes and judgments of sister States because of Congress' failure to prescribe the extra-state effect to be accorded public acts."[5] Subsequent to these decisions the Judicial Code was revised so as to make this final sentence provide:

> "*Such Acts* [of the legislature of any state], records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . from which they are taken."[6] (Emphasis supplied.)

Whether the effect of this amendment has been to give to State statutes the same imperative obligation as this Court had held must be given judgments,[7] or if not, what is its effect, this Court has not yet determined.

It has been held for many years that judgments must be enforced by a sister State even though the suit on which

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[5] *Hughes* v. *Fetter*, 341 U. S. 609, 613 (1951), citing as examples of such decisions *Pacific Ins. Co.* v. *Commission*, 306 U. S. 493, 502 (1932) and *Alaska Packers Ass'n* v. *Commission*, 294 U. S. 532, 547 (1935). See also *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, 437 (1943).

[6] *Act of June 25, 1948*, 62 Stat. 947.

State statutes had been held by this Court to be "Public Acts" within the Constitutional provision. *Hughes* v. *Fetter*, 341 U. S. 609, 611 (1951) and cases cited in note (5) therein.

[7] See *Hughes* v. *Fetter*, 341 U. S. 609, Note (4).

the judgment was obtained could not have been maintained under the laws and policy of the forum to which the judgment was brought for enforcement. *Milwaukee County* v. *M. E. White Co.*, 296 U. S. 268, 276 (1935); *Fauntleroy* v. *Lum*, 210 U. S. 230 (1908); *Kenney* v. *Supreme Lodge*, 252 U. S. 411 (1920). And this is so even though a suit upon the original cause of action was barred by the statute of limitations of the forum before the judgment was procured. *Christmas* v. *Russell*, 5 Wall. 290 (1866); *Roche* v. *McDonald*, 275 U. S. 449 (1928). It would certainly seem, however, that by the amendment Congress intended to further restrict the already narrow room left for the "play of conflicting policies"[8] among the States.

The purpose of the Full Faith and Credit Clause, as stated by Justice Stone in *Milwaukee County* v. *M. E. White Co.*, 296 U. S. 268, 277 (1935), "was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin."[9]

Read literally, these provisions would, of course, require the United States District Court in Philadelphia to give to the two-year limitation in the Alabama statute on which this suit was based "the same full faith and credit" as it

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[8] See Brandeis, J. in *Broderick* v. *Rosner*, 294 U. S. 629, 642 (1935).

[9] "The full faith and credit clause . . . is but another limitation voluntarily imposed, by the people of the United States, upon the sovereignty of their respective states in applying the law of the forum." Mr. Justice Burton in *Order of United Commercial Travelers of America* v. *Wolfe*, 331 U. S. 586, 607 (1947).

"For the States of the Union, the constitutional limitation imposed by the full faith and credit clause abolished, in large measure, the general principle of international law by which local policy is permitted to dominate rules of comity." Brandeis, J. in *Broderick* v. *Rosner*, 294 U. S. 629, 643 (1935).

would have been given by the Alabama courts had it been possible for petitioner to have brought the present suit there.

As Chief Justice Stone said in the opinion in *Pink* v. *A.A.A. Highway Express, Inc.*, 314 U. S. 201, 210 (1941):

> ". . . But the very nature of the federal union of states, to each of which is reserved the sovereign right to make its own laws, precludes resort to the Constitution as the means for compelling one state wholly to subordinate its own laws and policy concerning its peculiarly domestic affairs to the laws and policy of others. When such conflict of interest arises, it is for this Court to resolve it by determining how far the full faith and credit clause demands the qualification or denial of rights asserted under the laws of one state, that of the forum, by the public acts and judicial proceedings of another. See *Alaska Packers Assn.* v. *Commission*, 294 U. S. 532, 547; *Pacific Ins. Co.* v. *Commission*, 306 U. S. 493."

In *Pacific Ins. Co.* v. *Commission* Justice Stone said (p. 502):

> "This court must determine for itself how far the full faith and credit clause compels the qualification or denial of rights asserted under the laws of one state, that of the forum, by the statute of another state."

Accordingly, where the interests of the forum have been such as to justify a limited application of the Full Faith and Credit Clause, and there has been a clear expression by the courts or legislature of the forum State of a public policy "obnoxious" to application of the foreign law, this Court has permitted the forum State to disregard the foreign law.[10] However, in those instances where a local

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[10] See, e. g., *Pink* v. *A.A.A. Highway Express*, 314 U. S. 201 (1941); *Griffin* v. *McCoach*, 313 U. S. 498, 507 (1941); *Pacific Employers Ins. Co.* v. *Industrial Acc. Com.*, 306 U. S. 493 (1939); *Hughes* v. *Fetter*, 341 U. S. 609, Note (7).

policy has been permitted to prevail against the contention that the Full Faith and Credit Clause demanded application of the law of the place where the cause of action arose, there has always been present an element of peculiarly local concern. Where the forum has had little more concern with the transaction involved than simply being the forum, this Court has consistently required the forum to enforce rights given under the law of a sister State. In those cases the Court has held, regardless of how clearly the alleged policy of the forum was expressed, that the subject was not one with respect to which the forum could properly have a policy, such as enforcement of obligations voluntarily assumed under the laws of the other State as in *Converse* v. *Hamilton*, 224 U. S. 243 (1912) and *Broderick* v. *Rosner*, 294 U. S. 629 (1935), or the collection of a sister State's taxes, as in *Milwaukee County* v. *M. E. White Co.*, 296 U. S. 268 (1935). On the other hand, in those cases where there was an expression of the forum's public policy against enforcement of a foreign cause of action but it appeared from the treatment accorded similar domestic transactions or other foreign transactions that the forum had no real antagonism to the cause of action created by the law of the sister State, this Court has held that the alleged local policy must give way and the law of the sister State must be applied without consideration of whether the forum could properly have any policy with respect to the transaction under other circumstances. *Hughes* v. *Fetter*, 341 U. S. 609 (1951).

It is not necessary to decide in this case whether and to what extent Pennsylvania could properly have a legitimate public policy against enforcement of the two-year cause of action of Alabama under other circumstances. The fact is that the alleged public policy of Pennsylvania, as construed by the District Court, does not have as its basis any antago-

nism against granting remedies for wrongful death after one year. How can it possibly be so held in view of the Pennsylvania Act of 1937, which, as construed by the Pennsylvania Supreme Court,[11] allows a two-year limitation for actions in Pennsylvania on suits by a personal representative for the wrongful death of his decedent? It was and is our contention that Judge Kirkpatrick was wrong in his conclusion that the Pennsylvania Act of 1855 (providing a one-year limitation for actions by the husband, widow, parents or children) was applicable to this case. Be that as it may, the existence of the Act of 1855 does not indicate, much less demonstrate that a two-year limitation to an Alabama administrator is obnoxious to Pennsylvania policy. Nor would it make any difference if, instead of the Act of 1855 there were four statutes, one providing for an 18-month limitation for a suit by the children, another a 15-month period for a wife, a third with 12 months for the husband, and a fourth with 9 months for the parents. The existence of the 1937 act is conclusive that Pennsylvania "has no real feeling of antagonism"[12] against two-year limitation periods in actions for wrongful death.

This Case Is Controlled by the Principles of Both the Majority and the Minority Opinions in Hughes v. Fetter and First National Bank v. United Air Lines.

In *Hughes* v. *Fetter*, 341 U. S. 609 (1951) the Supreme Court of Wisconsin had sustained a Wisconsin statute permitting suits for wrongful death occurring within that State, but denying all remedy in the Wisconsin courts for death in an accident occurring outside of Wisconsin. This

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[11] *Stegner* v. *Fenton*, 351 Pa. 292, 40 Atl. (2) 473 (1945).

[12] See *Hughes* v. *Fetter*, 341 U. S. 609, 612 (1951).

Court held that this statute violated the Full Faith and Credit Clause of the Constitution. The majority said (610):

> "It [the Supreme Court of Wisconsin] held that a Wisconsin statute, which creates a right of action only for deaths caused in that state, establishes a local public policy against Wisconsin's entertaining suits brought under the wrongful death acts of other states."

The Court held that the finding by the Wisconsin Court as to the "local public policy" did not preclude this Court from considering whether there was any such basic policy, or whether the local policy was more important than that of enforcing the law of the place where the accident occurred. It then said (612):

> "We hold that Wisconsin's policy must give way. That state has no real feeling of antagonism against wrongful death suits in general. To the contrary, a forum is regularly provided for cases of this nature, the exclusionary rule extending only so far as to bar actions for death not caused locally." [13]

The Court also considered it "relevant, although not crucial here, that Wisconsin may well be the only jurisdiction in which service could be had as an original matter . . ." (p. 613).

In determining whether there is a "local public policy" so important as to control, when balanced against that of the foreign State and the general policy inherent in the Full Faith and Credit Clause, the Court will, we submit, consider whether the statute of the forum applies generally to all similar cases or whether it effects a discrimination against

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[13] Compare *Order of United Commercial Travelers* v. *Wolfe*, 331 U. S. 586, 612 (1947) where the court said:

> "Throughout this period, the South Dakota statutes, moreover, have expressed no hostility toward domestic or foreign fraternal benefit societies."

some litigants. In this connection, in *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329, 339 (1896), Justice Gray, after stating that as a general rule the limitation of actions is governed by the *lex fori*, said:

> "Neither the statutes nor the decisions of the State of Iowa [where the suit was brought] upon this subject have made any discrimination against the citizens, the contracts or the judgments of other States, or against any right asserted under the Constitution or laws of the United States. The case is thus distinguished from *Christmas v. Russell*, 5 Wall. 290, cited at the bar." [14]

The basis of the dissenting opinion in *Hughes* v. *Fetter* was that a sufficiently adverse policy in Wisconsin was indicated by the fact that, in cases of death elsewhere, witnesses might not be readily available, and by the fact that the Wisconsin courts might not be equally acquainted with the detailed local statute and the cases construing it. These considerations cannot apply to the case at Bar, since they would be equally applicable to suits on an Alabama cause of action within one year, which even the court below agreed would be permitted here.

In *First National Bank of Chicago* v. *United Air Lines*, 342 U. S. 396 (1952) it was held that the District Court in Illinois erred in dismissing the suit, under the Utah wrongful death statute, by an Illinois executor of an Illinois decedent, the Illinois statute forbidding a suit in Illinois for a death outside Illinois in cases where there was a right of

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[14] Compare *Woods* v. *Interstate Realty Co.*, 337 U. S. 535, 538 (1949). In *Rosenzweig* v. *Heller*, 302 Pa. 279, 285, 153 Atl. 346 (1931) the Pennsylvania decision principally relied on by Judge Kirkpatrick as establishing the one-year limitation policy prior to 1937, the court said:

> "Statutes of limitation should operate equally upon litigants seeking relief in our courts, upon those invoking remedies here for causes of action originating elsewhere, the same as upon those whose rights arise directly in our commonwealth."

action therefor under the laws of the place where the death occurred and service might be had there. This Court held that the fact that the Illinois statute permitted suits for out-of-state deaths if service could not be had where the death occurred did not validate the exclusion or indicate an adverse Illinois policy sufficient to justify a denial of full faith to the Utah statute. Apparently Justices Frankfurter and Burton, dissenting, were of a contrary opinion as to this, but such consideration is of course inapplicable in the case at Bar.

Justices Jackson and Minton, in a concurring opinion, noted that this was a diversity case, in which the "petitioner enters the federal court not by the grace of the laws of Illinois but by the grace of the laws of the United States." (p. 400.) They held that, irrespective of "whether or not Illinois may validly close her own courts to litigation of this kind, Illinois most assuredly cannot prescribe the subject matter jurisdiction of federal courts even when they sit in that State. Congress already has done this. 28 U. S. C. section 1332 (a)(1), and state law is powerless to enlarge, vary or limit this requirement." They further stated that while they believed, as stated in their dissenting opinion in *Hughes* v. *Fetter*, that Illinois was free to refuse that case a forum, yet "if it undertook to adjudicate the rights of the parties, the Constitution would require it to apply the law of Utah [Alabama], because all elements of the wrong alleged here occurred in Utah [Alabama]. For the essence of the Full Faith and Credit Clause is that certain transactions, wherever in the United States they may be litigated, shall have the same legal consequences as they would have in the place where they occurred." (p. 400).

Similarly, in the case at Bar, while, in accordance with the opinion of these two Justices Pennsylvania might conceivably have been free to refuse the present case a forum,

yet when it undertook to adjudicate the rights of the parties, the Full Faith and Credit Clause required that the Alabama statute, including the two-year limitation period, be given the same effect as it would have been given had petitioner been able to bring the suit in Alabama.

Accordingly, under all the majority, concurring and dissenting opinions in both cases, the Alabama statute was controlling.

The Two-Year Limitation Provision in the Alabama Statute Was of the Essence of the Cause of Action and Was One of Substantive Right.

Pennsylvania could not escape her obligation to give full faith and credit to Alabama law by declaring this to be a statute of limitations problem involving a matter of remedy as to which the rules of the forum apply. Nor, could the court below justify its decision by holding, correctly or incorrectly, that Pennsylvania had done so. In *Order of Commercial Travelers* v. *Wolfe*, 331 U. S. 586 (1947) this Court settled, at the very least, that where there is a conflict with respect to statutes of limitation it will, as in other conflicts of policy, evaluate the respective policies involved rather than apply an automatic rule to all cases. Moreover, even where a particular case has turned on the question of whether the matter involved was one of procedure or substance, this Court has been the final arbiter, not the forum State,[15] and it has long been the view of the Court that limitations provisions such as those contained in the Alabama wrongful death statute are matters of substance rather than remedy.[16]

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[15] *John Hancock Ins. Co.* v. *Yates*, 299 U. S. 178 (1936).

[16] *The Harrisburg*, 119 U. S. 199 (1886); *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507, 511 (1915); *Western Fuel Co.* v. *Garcia*, 257 U. S. 233 (1921).

The limitation provision of the Alabama statute was not in a general statute of limitations, but was contained in the wrongful death statute itself. Of it the Supreme Court of Alabama said in *Parker* v. *Fies & Sons*, 243 Ala. 348, 10 So. (2) 13 (1942), the very case relied on by Judge Kirkpatrick below:

> "The Statute requires suit brought within two years after death. This is not a statute of limitation, but of the essence of the cause of action, to be disclosed by averment and proof."

The lower Federal courts have been in disagreement on the question of whether a time provision which is part of the substantive cause of action must be enforced in the forum even where the statute of limitations of the forum is shorter.[17] This Court, however, has held that the substantive time provision operates both to prevent the action where the statute of limitations of the forum is longer and to permit it where the statute of limitations of the forum is shorter. *Engel* v. *Davenport*, 271 U. S. 33 (1926) was an action which had been brought in the California courts under the Merchant Marine Act, as supplemented by the Federal Employers' Liability Act, after one year but before two years had elapsed. The Supreme Court of California held that the one-year statute of limitations of California for personal injuries applied and prevented the action. This Court reversed on the ground that the two-year statute of limitations contained in the Employers'

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[17] See, e.g., *O'Neal* v. *National Cylinder Gas Co.*, 103 F. Supp. 720 (N. D. Ill., E.D. 1952); *Anderson* v. *Linton*, 178 F. (2) 304 (Ct. of App., 7th Cir. 1949); *Zellmer* v. *Acme Brewing Co.*, 184 F. (2) 940 (Ct. of App., 9th Cir. 1950); *Lewis* v. *R.F.C.*, 177 F. (2) 654 (Ct. of App. D.C. 1949); *McMillen* v. *Douglas Aircraft Co.*, 90 F. Supp. 679 (S.D. Calif., C.D. 1950); *Maki* v. *Geo. R. Cooke Co.*, 124 F. (2) 663 (C.C.A. 6th Cir. 1942), cert. den. 316 U.S. 686 (1942); *Wilson* v. *Massengill*, 124 F. (2) 666 (C.C.A. 6th Cir. 1942), cert. den. 316 U.S. 686 (1942); these two Sixth Circuit Court decisions are clearly directly in conflict with that of the court below in the case at Bar.

Liability Act applied, since it was part of the substantive right. The Co[illegible] said at page 38:

> ". . . This provision is one of substantive right, setting a limit to the existence of the obligation which the Act creates . . . *And it necessarily implies that the action may be maintained, as a substantive right, if commenced within the two years.*" (Emphasis supplied)

While it is true that the above case involved a right of action given by a Federal statute, the same principle applies under the Full Faith and Credit Clause to a provision of substantive right given by a State statute, particularly in view of the recent amendment by Congress to the Judicial Code specifically including State statutes as entitled to full faith and credit in identical terms with those applied to judgments.

In this Alabama statute the limitation provision is prescribed in the very statute which created the cause of action. It does not operate merely to bar the remedy but constitutes an essential element in the cause of action, a part of the substantive right given by the statute. As such, it is to be enforced in Pennsylvania. There cannot be said to be a "local public policy" in Pennsylvania against a two-year limitation in wrongful death statutes, since Pennsylvania itself allows two years in its Act of 1937.

The decision of the Court of Appeals should therefore be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 394

ROBERTA WELLS, AS ADMINISTRATRIX OF THE ESTATE OF CHEEK WELLS,

Petitioner,

vs.

SIMONDS ABRASIVE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD DISTRICT

REPLY BRIEF FOR PETITIONER

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The crucial fallacy of Respondent's argument is the assumption that the question in this case is: Which of two Pennsylvania statutes most nearly resembles the Alabama statute on which this action is based? This was substantially the first question in the petition for certiorari, which, however, this Court declined to review, granting the writ solely on the second question: Whether, irrespective of the correctness or incorrectness of the application of Pennsylvania law by the Court below, its decision resulted in a violation of the Full Faith and Credit Clause. Here the basic question is whether a two-year limitation period of

the Alabama statute, in an action by a personal representative for the instant death of his decedent, is so obnoxious to the public policy of Pennsylvania that full faith and credit need not be given to it in a suit in the District Court in Pennsylvania by an Alabama administrator.

As conclusive of the absence of such an antagonistic public policy, Petitioner points to Section 35(b) of the Pennsylvania Act of 1937 which authorizes an action to be commenced and prosecuted by the personal representative of one killed by wrongful act in Pennsylvania and which, as held by the Supreme Court of Pennsylvania, is subject to a two-year limitation period. This, as in *Hughes* v. *Fetter*, 341 U. S. 609, 612 (1951), shows that Pennsylvania "has no real feeling of antagonism against [two-year limitations in] wrongful death suits * * *."

Respondent now seeks to impose on the Court the task of delving into the very perplexing confusion in the Pennsylvania wrongful death decisions which, by refusing to consider Petitioner's first point, the Court avoided. Respondent materially adds to this confusion by quoting on page 5 of its brief the leading case in Alabama of *Parker* v. *Fies and Sons*, 243 Ala. 348, holding that the only recovery in Alabama for wrongful death is under the Homicide Act and that the Alabama Survival Statute has no application to a wrongful act causing death. Far from aiding Respondent's case the quotation from the Alabama case points up the fact that the reverse is true in Pennsylvania. It was specifically held in *Murray* v. *P. T. Co.*, 359 Pa. 69; 58 A. (2) 323 (1948), contrary to the interpretation placed by Alabama on its survival statute, that the so-called Pennsylvania "Survival" Act of 1937 does apply to a wrongful act causing death, and in fact provides a complete remedy therefor.

It is evident from the quotations from Pennsylvania decisions found in Respondent's brief that there is consid-

erable confusion arising out of the language used by the Pennsylvania Supreme Court. It is believed that much of the confusion is due to the fact that the so-called Survival Statute in Pennsylvania[1] contains two sections, 35(a) and 35(b). Section 35(a), which was a part of the Fiduciaries Act of 1917, provides that no suit brought by the decedent during his life shall abate by reason of his death, but that the personal representative may be substituted as plaintiff. This is properly designated a Survival Statute, since under it the *suit* brought by the injured man survives his death. Section 35(b) (which by an amendment to the Fiduciaries Act of 1917 became effective in 1937 and hence is known as the Act of 1937) provides that an executor shall have power to "*commence and prosecute* . . . all personal actions which the deceased might have commenced and prosecuted." It is this Section 35(b) which has been construed by the Pennsylvania Supreme Court as applicable to causes of action for death by wrongful act and as subject to the two-year limitation period.[1] This provision applies to cases where no suit has been brought by the decedent. Under it, as under all Wrongful Death Statutes, the *cause of action* to the personal representative based on the negligent killing is not ended by, and, in that sense, survives his death. *Fisher* v. *Hill*, 368 Pa. 53; 81 A. (2) 860 (1951).

Respondent, who fails to meet the real issue in this case, nowhere suggests any ground for a different limitation policy in Pennsylvania in actions by a personal representative under the Alabama statute from those which would apply to an action by the personal representative under

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[1] *Stegner* v. *Fenton*, 351 Pa. 292, 40 A (2) 473 (1945).

A large part of the confusion in the Pennsylvania decisions is believed due to the fact that this Section 35(b) was ineffective prior to 1937, so that until then the only statute providing damages for death by wrongful act was the Act of 1855, which contains a one-year limitation.

Section 35(b) of the Pennsylvania Act of 1937. Certainly none of the circumstances stated on pages 4 to 7 of Respondent's brief point to any different public policy under these two Acts.

The real question in the present case in no way depends on what the different Pennsylvania statutes have been *called*, but on what they *provide*. Nor does it matter which one most nearly resembles the Alabama statute on which this suit is based. There is no Pennsylvania statute which is identical with that of Alabama. The Act of 1855 on which Respondent relies is unlike the Alabama statute, providing, as it does, for suits by the husband or widow, whereas the Alabama Act provides for a suit by the personal representative, as does Section 35(b) of the Pennsylvania Act f 1937. The Alabama statute differs from both Pennsylvania Acts in providing for punitive damages. The present suit is brought under the Alabama Act and the Pennsylvania statutes are relevant, not as specifically providing the limitation period applicable to this case, but merely as indicative of whether there exists in Pennsylvania a public policy antagonistic or obnoxious to that of Alabama permitting a two-year period for bringing suits of this nature.

Respondent repeatedly denies, with very positive although unjustified assurance, the correctness of Petitioner's statement that the Act of 1937 provides a *complete remedy* for death by wrongful act. The accuracy of Petitioner's Statement is fully sustained by *Murray* v. *P. T. Co.*, 359 Pa. 69, 58 A. (2) 323, which was decided in 1948 after rehearing and recall of the original opinion, and which modified, either specifically or in effect, statements made in a number of the Court's previous decisions,[2] which

[2] Including *Pezzulli* v. *D'Ambrosia*, 344 Pa. 643, 26 A. (2) 659 (1942); *Piacquadio* v. *Beaver Valley Service Co.*, 355 Pa. 183, 49 A. (2) 406 (1946), and *Stegner* v. *Fenton*, 351 Pa. 292, 40 A. (2) 473 (1945).

statements are now extensively quoted and relied on by Respondent. The *Murray* case, supplemented by the later decision in *Fisher* v. *Hill*, 368 Pa. 53, 81 A. (2d) 860 (1951), holds squarely:

1. That the common law rule denying the right to sue for wrongful death was superseded in Pennsylvania by three statutory provisions:

> (a) Section 35(a) of the Fiduciaries Act of 1917 permitting the personal representatives to be substituted for a decedent who had brought suit before his death;[3]
>
> (b) Section 35(b) of the Fiduciaries Act, (known as the Act of 1937) providing for a suit by the personal representative of one who had not so brought suit; for the gross amount which decedent would have earned during his probable lifetime, had he lived, less his probable living expenses, reduced to present worth;
>
> (c) the Act of 1855 providing for a suit by the widow, husband, children or parents, under which they are entitled to such amount as the decedent would have given them *out of his earnings*, had he lived.

2. That the remedies under (b) and (c) above are required by Pennsylvania Rule of Civil Procedure No. 2202 to be consolidated in one action in order to recover under both.

3. That when the surviving relatives do not bring an action under the Act of 1855, nevertheless the entire amount recoverable for the wrongful death may be included in the verdict under Section 35(b) of the Act of 1937.

4. That where both remedies are pursued in the same suit, the jury, in order to avoid the duplication of damages,

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[3] Section 35(a) is the only true Survival Act. Although Section 35(b) (the Act of 1937) is also referred to as a Survival Act, the only thing that survives thereunder is the *Cause of action*, which survives under all wrongful death acts. The *Murray* case established that the right of recovery is not the same as under Section 35(a).

must fix the maximum amount of the damages recoverable under Section 35(b) of the Act of 1937; fix also that recoverable under the Act of 1855 (which goes to the widow, etc.); and deduct this from the amount receivable by the personal representatives.

It is therefore perfectly clear that the full remedy for wrongful death is provided under the Act of 1937; that the *entire amount* recoverable under both Acts may be recovered under the Act of 1937 alone; and that the only effect of the 1855 Act is to permit certain surviving relatives to obtain a portion of this amount, without administration and free of Pennsylvania inheritance tax and the claims of creditors.

* * * * * * *

Respondent in its brief at page 13 argues that the early case of *McElmoyle* v. *Cohen*, 13 Pet. 312 (1839), and like cases, establish the rule that the statute of limitations of the forum always governs, even though the limitation of the state where the cause of action arose is longer. While those cases may establish that a state may under appropriate circumstances have a valid policy with respect to the time within which suit on a foreign cause of action must be brought, provided such policy denies no substantive rights granted by the law creating the cause of action, they certainly do not establish the automatic rule contended for by Respondent. In fact, in *Order of Travelers* v. *Wolfe*, 331 U. S. 586 (1947), where it was held that South Dakota could not apply its statute of limitations to an Ohio cause of action which carried with it a shorter limitation, the majority said at page 627 that in their opinion this decision in effect overruled *McElmoyle* v. *Cohen*. Actually, the majority reached its decision by applying to the problem the usual principles underlying the cases involving full faith and credit and examining whether South Dakota

had a basically antagonistic policy, founded on a sufficient local interest, against the Ohio limitation.[4] It is not our view, therefore, that it is necessary, in order to decide the case at Bar in favor of Petitioner, for this Court to overrule *McElmoyle* v. *Cohen*, since it is clearly distinguishable both on the ground that the Alabama statute does not pertain to the remedy but to the "substantive cause of action"; and also that Section 35(b) of the Pennsylvania Act of 1937 demonstrates beyond question that Pennsylvania public policy with regard to the limitation period in actions for wrongful death is not basically antagonistic to that of Alabama.

Respondent discusses several diversity cases which hold generally that the federal courts must follow the laws of the states in which they sit. Those cases, of course, are not controlling where, as here, a constitutional right is infringed. Moreover, those cases in fact represent an attempt by this Court in recent years to assure that the substantive rights of parties in federal suits are determined in accordance with the law creating the cause of action. As stated in *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239 (1942) at page 245:

> "The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates."

In that case, as in *Engel* v. *Davenport*, 271 U. S. 33 (1926), the Court held that a state court having concurrent jurisdiction with the federal courts in enforcing a right created by federal law, must apply certain federal rules despite the fact that such rules may have traditionally been denomi-

[4] For examples of earlier cases in which this Court indicated that statutes of limitation of the forum must meet the test of the Full Faith and Credit Clause, see *Christmas* v. *Russell*, 5 Wall. 290 (1866); *Roche* v. *McDonald*, 275 U. S. 449 (1928).

nated "procedural," and expressly stated that the same philosophy was the basis of the *Erie* v. *Tompkins* line of cases. To the extent, therefore, that such cases have any importance here they work for the proposition that the result in the present action should be no different than if brought in the courts of the State creating the cause of action, i.e., Alabama.

* * * * * * *

Only one other point in Respondent's brief need be noted. In its Summary of the Argument, it for the first time in this litigation emphasizes the phrase "*and not elsewhere*" relative to the Alabama authorization of a suit for wrongful death to be brought within the State of Alabama. On pages 20-21 of its brief it argues that the above phrase precludes any action based on the Alabama statute in the courts of Pennsylvania. No such contention was made by it in the District Court, in the Circuit Court of Appeals or in the brief in this Court in opposition to the petition for certiorari. Doubtless, the reason for this was that the question had been decided specifically by this Court against Respondent's contention in *Tennessee Coal, Iron & Railroad Company* v. *George*, 233 U. S. 354 (1914), where the Court, construing another Alabama statute, said.

> "The record raises the single question as to whether the full faith and credit clause of the Constitution prohibited the courts of Georgia from enforcing a cause of action given by the Alabama Code, to the servant against the master, for injuries occasioned by defective machinery, when another section of the same Code provided that suits to enforce such liability 'must be brought in a court of competent jurisdiction within the State of Alabama *and not elsewhere*.'" (pp. 358-359) . . . But the owner of the defective machinery causing the injury may have removed from the State and it would be a deprivation of a fixed right if the

plaintiff could not sue the defendant in Alabama because he had left the State nor sue him where the defendant or his property could be found because the statute did not permit a suit elsewhere than in Alabama. The injured plaintiff may likewise have moved from Alabama and for that, or other, reason may have found it to his interest to bring suit by attachment or *in personam* in a State other than where the injury was inflicted.

"The courts of the sister State trying the case would be bound to give full faith and credit to all those substantial provisions of the statute which inhered in the cause of action or which name conditions on which the right to sue depend. But venue is no part of the right: and a State cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction. That jurisdiction is to be determined by the law of the court's creation and cannot be defeated by the extraterritorial operation of a statute of another State, even though it created the right of action." (pp. 359-360).

Respectfully submitted,

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IN THE

Supreme Court of the United States

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No. ~~52 Misc.~~

October Term, 1952.

ROBERTA WELLS, As Administratrix of the Estate of CHEEK WELLS,

Petitioner,

v.

SIMONDS ABRASIVE COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPENDIX.

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IN THE

Supreme Court of the United States.

No. 52 Misc.

October Term, 1952.

ROBERTA WELLS, as Administratrix of the Estate of CHEEK WELLS,

Petitioner,

v.

SIMONDS ABRASIVE COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is reported in 102 F. Sup. 519.

The opinions of the Court of Appeals for the Third Circuit are reported in 195 F. 2d 814.

JURISDICTION.

The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928 (28 U. S. C. § 1254).

QUESTIONS PRESENTED.

1. In a diversity action for a wrongful death which occurred in Alabama, brought by an Alabama administratrix in a Federal Court sitting in Pennsylvania, should not plaintiff's right of action be barred by the one-year limitation provision of the Pennsylvania Wrongful Death Act, since such a right of action would have been so barred had suit been brought in a Pennsylvania Court based on a death which had occurred in Pennsylvania?

2. May not a Federal Court in a diversity action apply the limitation provision of the State of the forum to a foreign right of action for wrongful death without violating the full faith and credit clause of the United States Constitution?

STATUTES INVOLVED.

The statutes involved are:

The Alabama Homicide Act. Tit. 7, Code of Alabama 1940, Section 123.

The Alabama Survival Acts. Tit. 7, Code of Alabama 1940, Sections 150 and 153.

The Pennsylvania Wrongful Death Acts. Act of April 15, 1851, P. L. 669, Section 19, 12 P. S. Section 1601; Act of April 26, 1855, P. L. 309, Sections 1 and 2 (as amended), 12 P. S. Sections 1602 and 1603.

The Pennsylvania Survival Acts. Act of June 7, 1917, P. L. 447, Section 35(a) (as amended), 20 P. S. Ch. 3, App. Section 771; Act of July 2, 1937, P. L. 2755, Section 2, 20 P. S. Ch. 3, App. Section 772, and

The Constitution of the United States, Article IV, Section 1.

ARGUMENT.

I. Introduction.

The decision of the Court below was clearly right. It is in accord with the only other decision of a Court of Appeals on the point at issue, correctly interprets the law of Alabama and Pennsylvania and is not at variance with any decision of this Court. The case involves the proper interpretation of the statute law of Alabama and Pennsylvania and presents no new question requiring adjudication by this Court.

Since the present action was founded solely upon diversity of citizenship, the District Court was required to apply the Statute of Limitations of Pennsylvania, *Guaranty Trust Company v. York*, 326 U. S. 99 (1945); *Moore v. Illinois Cent. R. R.*, 312 U. S. 630 (1941); and was also bound to apply the Conflict of Laws Rules of that State, *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487 (1941); *Griffin, Admr. v. McCoach*, 313 U. S. 498 (1941).

Petitioner's right of action was created by the Wrongful Death Act of Alabama, which is known in Alabama as the Homicide Act, Tit. 7, Code of Ala. 1940, § 123 (Respondent's Appendix, p. 27). An action under that Act may be brought within two years after the death. The Pennsylvania Wrongful Death Acts, which are commonly construed together as if they were but one Act, are the Acts of April 15, 1851, P. L. 669, § 19, and April 26, 1855, P. L. 309, §§ 1, 2 (Respondent's Appendix pp. 25, 26). Under those acts suit must be brought within one year after the death.

If an action is brought in Alabama to recover damages for personal injuries, and the plaintiff dies from some cause unrelated to the accident, his personal representatives may continue the suit so brought, Tit. 7, Code of Ala. 1940, §§ 150 and 153 (Respondent's Appendix p. 27); but if the plaintiff's death results from the negligent act on which his suit for personal injuries was based, the decedent's

action does not survive to his personal representatives, *Bruce v. Collier*, 221 Ala. 22, 127 So. 553 (1930). In such case the only right of action is in the personal representatives under the Homicide Act and a new action must be brought under that Act. *Parker v. Fies & Sons*, 243 Ala. 348, 350, 10 So. 2nd 13, 14 (1942); *Smith v. Lilley*, 252 Ala. 425, 430, 41 So. 2nd 175, 179 (1949).

Unlike Alabama, Pennsylvania has, in addition to the Wrongful Death Acts of 1851 and 1855, a Survival Act, the Act of July 2, 1937, P. L. 2755 § 2 (Respondent's Appendix, p. 26). That Act, under which suit may be brought within two years after the death, creates a right of action unknown in Alabama and which authorizes the personal representatives of a person killed by another's negligence themselves to bring suit to enforce, for the benefit of the estate of the deceased, the right of action which accrued to the deceased at common law because of the tort, and in this manner to recover for his estate, as distinguished from his widow, children or parents, whose right of action exists under the Act of 1855, such amount as he himself might have recovered ha he lived.

The District Court and the Court of Appeals held that the Alabama Homicide Act was a death statute, whose counterpart in Pennsylvania was the Act of 1855, and therefore that the one-year period of limitation contained in the Pennsylvania Act barred the present action. The Courts below distinguished the Pennsylvania Acts of 1855 and 1937 and, following the interpretation given them by the Supreme Court of Pennsylvania, reached the conclusion that, since the Pennsylvania Act of 1937 was not a death statute and did not purport to create a right of action similar to that created by the Alabama Homicide Act, the period of limitation which governed actions brought under it was inapplicable to the present action, just as the periods of limitation applicable to actions in assumpsit, or to the exercise of any other rights, were equally inapplicable.

Throughout her petition, petitioner has persistently refused to recognize the distinction between the two types of action created by the Pennsylvania statutes, and asserts that because the Pennsylvania Survival Act of 1937 creates a right which may be asserted by the personal representatives of the deceased within two years after the death, she, as the personal representative of her deceased, may assert the right granted her by the Alabama death statute within the same period of time. In so doing she claims that there is really no difference between the Pennsylvania death statute and the Pennsylvania survival statute.

An examination of the statutes of Pennsylvania and of the decisions of the Supreme Court of Pennsylvania construing them shows that the petitioner's position is directly contrary to that taken by the Supreme Court of Pennsylvania and that the Courts below were clearly right in their interpretation of the Pennsylvania law. Because of the bizarre interpretation of the Pennsylvania law devised by the petitioner, those decisions must now be reviewed in some detail.

II. The Pennsylvania Wrongful Death Act and Survival Act Provide Different Rights of Action With Separate Limitation Provisions.

Petitioner's entire argument is based on the false premise that there is no difference between the Wrongful Death Act of 1855 and the Survival Act of 1937, and that, irrespective of the nature of the cause of action created by the Alabama Homicide Act, she is entitled to bring her action within the two-year period of limitation of the Pennsylvania Act of 1937 and thus avoid the one-year period of limitation of the Pennsylvania Act of 1855.

Petitioner places reliance on the fact that suits under the Alabama Homicide Act and under the Pennsylvania Survival Act of 1937 must be prosecuted by the personal representatives of the deceased, and throughout her petition petitioner has emphasized, by underlining and other means, that she is suing in a representative capacity. How-

ever, this is totally without significance, since under the Pennsylvania Rule of Civil Procedure 2202(a) actions for wrongful death under the Act of 1855 must also be brought by the decedent's personal representative, and under Pa. R. C. P. 2202(b) may be so brought. But, even though the proper plaintiff in suits in Pennsylvania brought either under the Death Act of 1855 or the Survival Act of 1937 is the personal representative of the deceased, the Pennsylvania Courts have carefully preserved the distinction between those two Acts and have recognized both the fundamental difference in the causes of action created by the two Acts as well as the difference in the beneficiaries for whom the actions may be brought under them.

Throughout her petition the petitioner has persistently confused the Pennsylvania Acts of 1855 and 1937 and has made statements which, if accepted uncritically, might lead one to suppose that the Pennsylvania Courts treated the two Acts as one and made no distinction between them, either for the purpose of determining the time within which actions must be brought under them or otherwise. However, the law of Pennsylvania cannot be determined from the petition, and thus the statements of the Supreme Court of Pennsylvania construing the Pennsylvania statutes must themselves be examined.

The Pennsylvania Wrongful Death Act consists of statutes enacted in 1851 and 1855, which, in Pennsylvania, are treated together as one Act, and provides a right of action unknown to the common law for the recovery of damages by designated relatives "whenever death shall be occasioned by unlawful violence or negligence." Suit must be brought within one year after death "and not thereafter." Act of April 15, 1851 P. L. 669, § 19, 12 P. S. 1601; Act of April 26, 1855, P. L. 309, § 1, as amended by Act of April 1, 1937, P. L. 196, § 1, 12 P. S. 1602; Act of April 26, 1855, P. L. 309, § 2, 12 P. S. 1603 (Respondent's Appendix, pp. 1a, 2a). This is the only statutory basis for the "true action for wrongful death." *Goodrich-Amram Procedural Rules Service*, § 2201-38. It establishes a right of action in the

beneficiaries to recover damages accruing to them because of the decedent's death. *Pezulli v. D'Ambrosia*, 344 Pa. 643, 647, 26 A. 2d 659, 661 (1942); *Funk v. Buckley & Co., Inc.*, 158 Pa. Super. 586, 590, 45 A. 2d 918, 920 (1946). Under Pa. R. C. P. 2202(a) actions for wrongful death are brought, as are survival actions, by the decedent's personal representative.

Section 35(a) of the Fiduciaries Act of 1917 provides for the continuation by the personal representative of a decedent of an action for personal injuries [1] actually begun by the decedent during his lifetime. Act of June 7, 1917, P. L. 447, § 35a, as amended by Act of March 30, 1921, P. L. 55, § 1, 20 P. S. Ch. 3, App. 771 (Respondent's Appendix, p. 26). This is not a death statute at all. Its only effect is to enable the personal representative to continue the *same* suit started by the decedent before he died, which is "not 'an action to recover damages for a death'", *Radobersky v. Imperial Vol. Fire Dept.*, 368 Pa. 235, 243, 81 A. 2d 865, 869 (1951), but "still an action for personal injuries." *Id.* at p. 241. The fact that the decedent has died does not convert the suit into an action for wrongful death. *Goodrich-Amram Procedural Rules Service* § 2201-2 p. 6.

The Act of 1937, amending § 35(b) of the Fiduciaries Act of 1917, provides for the commencement and prosecution by the personal representative of an action for personal injuries to the decedent.[2] Act of July 2, 1937, P. L.

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1. The section covers all types of personal actions, except libel and slander, as well as actions for mesne profits and for trespass to real property. Its provisions are now embodied in the Fiduciaries Act of 1949. Act of April 18, 1949, P. L. 512, art. VI, § 601, 20 P. S. 320.601. Although referred to by petitioner, this section has no application where, as here, no suit was instituted by the decedent in his lifetime which the personal representative seeks to continue.

2. § 35(b) was re-enacted changing only the title to eliminate the constitutional objection raised in *Strain v. Kern*, 277 Pa. 209, 120 Atl. 818 (1923). The section covers

2755, § 2, 20 P. S. Ch. 3, App. 772 (Respondent's Appendix, p. 26). This also is not a "death statute" but merely enables the decedent's personal representative to bring a separate suit on the right of action for personal injuries that had accrued to the decedent at common law because of the tort. *Pezzulli v. D'Ambrosia*, 344 Pa. 643, 647, 26 A. 2d 659, 661 (1942); *Piacquadio v. Beaver Valley Service Co.*, 355 Pa. 183, 185, 49 A. 2d 406, 407 (1946); *Funk v. Buckley & Co., Inc.*, 158 Pa. Super. 586, 591, 45 A. 2d 918, 920 (1946). In *Stegner v. Fenton*, 351 Pa. 292, 40 A. 2d 473 (1945), for the declared reason that the Act of 1937 was a "survival" act and not a "death" statute like the Wrongful Death Act, *id.* at p. 295, the Pennsylvania Supreme Court held that it was subject to the two-year statute of limitations instead of the one-year provision of the Act of 1855.

The Pennsylvania courts have always recognized a clear distinction between the right of action for wrongful death and the right of action under the Act of 1937. *Pezzulli v. D'Ambrosia*, 344 Pa. 643, 647, 26 A. 2d 659, 661 (1942); *Stegner v. Fenton*, 351 Pa. 292, 294, 40 A. 2d 473, 474 (1945); *Piacquadio v. Beaver Valley Service Co.*, 355 Pa. 183, 185, 49 A. 2d 406, 407 (1946); *Murray v. P. T. C.*, 359 Pa. 69, 71, 58 A. 2d 323, 324 (1948); *Ferne v. Chadderton*, 363 Pa. 191, 197, 69 A. 2d 104, 107 (1949); *Funk v. Buckley & Co., Inc.*, 158 Pa. Super. 586, 590, 45 A. 2d 918, 920 (1946). In *Pezzulli v. D'Ambrosia, supra*, the distinction was defined by the Court in the following passage (344 Pa. at p. 647, 26 A. 2d at p. 660):

> "Under the present statutory law of Pennsylvania, if a suit for personal injuries is not brought during his life by the person injured two actions may be

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all types of personal actions, except libel and slander, as well as actions for mesne profits and for trespass to real property. Its provisions are now embodied in the Fiduciaries Act of 1949. Act of April 18, 1949, P. L. 512, art. VI, § 603, 20 P. S. § 320.603.

brought after his death (as they were in the present instance) for the recovery of damages—one under the acts of 1851 (section 19) and 1855, the other under the act of 1937. *Such actions are entirely dissimilar in nature.* The one represents a cause of action unknown to the common law and is for the benefit of certain enumerated relatives of the person killed by another's negligence; the damages recoverable are measured by the pecuniary loss occasioned to them through deprivation of the part of the earnings of the deceased which they would have received from him had he lived. The other is not a new cause of action at all, but merely continues in his personal representatives the right of action which accrued to the deceased at common law because of the tort; . . . ." (Emphasis supplied.)

This distinction has, of course, been extended to the limitation provisions applicable to suits arising under these Acts. In *Stegner v. Fenton*, 351 Pa. 292, 40 A. 2d 473 (1945), the Supreme Court of Pennsylvania traced their history and held that suits under the Act of 1937 are subject to the two-year statute of limitations while actions under the Wrongful Death Act are subject to its one-year limitation provision. *Id.* at p. 296. In reaching this conclusion the Court said (351 Pa. at p. 295, 40 A. 2d at p. 475):

> "By no stretch of imagination can the provisions of that act [the Act of 1855] be grafted upon the *'survival' Act of 1937*, supra, which was passed for an entirely different purpose. *The Acts of 1851 and 1855, supra, are 'death' statutes, not 'survival' acts.*" (Emphasis supplied.)

In *Piacquadio v. Beaver Valley Service Co.*, 355 Pa. 183, 49 A. 2d 406 (1946), the Supreme Court of Pennsylvania held that a complaint in a wrongful death action could not be amended more than two years after the injury to include an action for damages under the Act of

1937. The Court distinguished the two types of action in the following language (355 Pa. at p. 185, 49 A. 2d at p. 407):

> "Although they arise out of a common factual background, *the death action under the Acts of 1851 and 1855, is a separate and distinct cause of action from the cause of action for the decedent's injuries which survives his death under the Act of 1937.* 'The one represents a cause of action unknown to the common law and is for the benefit of certain enumerated relatives of the person killed by another's negligence . . . . The other is not a new cause of action at all, but merely continues in his personal representatives the right of action which accrued to the deceased at common law because of the tort' . . . *Different statutes of limitation apply to the two causes of action. The one-year limitation of the Wrongful Death Act is not applicable to a suit brought pursuant to the Survival Act.*" (Emphasis supplied.)

The Supreme Court of Pennsylvania has consistently recognized the distinction between the rights of action under the Wrongful Death Act of 1855 and the Survival Act of 1937. See *Ferne v. Chadderton*, 363 Pa. 191, 197, 69 A. 2d 104, 107 (1949); *Fisher v. Hill*, 368 Pa. 53, 60, 81 A. 2d 860, 864 (1951). And it has also continued to recognize, as it must in the absence of legislative modification, the one-year limitation provision of the Wrongful Death Act. See *Echon v. Pennsylvania Railroad Co.*, 365 Pa. 529, 532, 76 A. 2d 175, 177 (1950); *Foley v. The Pittsburgh-Des Moines Co.*, 363 Pa. 1, 9, 68 A. 2d 517, 521 (1949).

Completely ignoring these decisions, petitioner says (petition pp. 12 and 14) that the Act of 1937 is "sometimes" called a survival statute and, indeed, (p. 14) ventures to say that it is not a survival act at all and that any attempt to distinguish between the Pennsylvania Acts by describing one as a death statute and the other as a survival statute "is totally unjustified."

It is quite clear, however, from a consideration of the foregoing cases, that the Supreme Court of Pennsylvania has carefully preserved the distinction between the two Acts, not only in respect of the measure of damages recoverable under each, but also of the separate periods of limitation that are applicable to them.

It accordingly becomes important to determine whether the Alabama Homicide Act is a death statute, which would make actions based upon it brought in Pennsylvania subject to the one-year limitation period of the Pennsylvania statute, or whether it is a survival statute which, under Pennsylvania law, would give a plaintiff bringing suit in Pennsylvania two years within which to assert his rights. As will be shown hereafter (pp. 16, 17), the policy of the State of Pennsylvania, to which the Federal Courts sitting therein must give effect, *Guaranty Trust Co. v. York*, 326 U. S. 99, 109 (1945); *Regan v. Merchants Transfer & Warehouse Co.*, 337 U. S. 530 (1949), is to permit plaintiffs whose rights of action arise under the statutes of other states to bring suits in Pennsylvania within, but not after, the expiration of the period of limitation applicable to like causes of action which arise in Pennsylvania, but the nature of the Alabama statute will first be examined.

III. The Alabama Homicide Act Is a Death Statute.

Both the statute itself (Respondent's Appendix, p. 27) and the Alabama decisions interpreting it make it clear that the right of action that the Alabama Homicide Act creates is for wrongful death. *Smith v. Lilley*, 252 Ala. 425, 430, 41 So. 2d 175, 179 (1949); *Parker v. Fies & Sons*, 243 Ala. 348, 350, 10 So. 2d 13, 15 (1942); *Bruce v. Collier*, 221 Ala. 22, 23, 127 So. 553, 554 (1930); *Webb v. French*, 228 Ala. 43, 45, 152 So. 215, 217, (1934); *Kennedy v. Davis*, 171 Ala. 609, 612, 55 So. 104, 105 (1911). The nature of the right created by the Alabama Act is succintly stated in *Parker v. Fies & Sons*, *supra* (243 Ala. at p. 350, 10 So. 2d at p. 15):

> "*Our Homicide Act is a death statute*, a punitive statute to prevent homicides. *It creates a new and distinct cause of action, unknown at common law. The cause of action comes into being only upon death from wrongful act.*
>
> "These concepts are so fully settled that further statement need not be indulged. Breed v. Atlanta, B. & C. R. Co., 241 Ala. 640, 4 So. 2d 315; Pickett v. Matthews, 238 Ala. 542, 192 So. 261; Anno. Code of 1940, Title 7 § 123." (Emphasis supplied.)

In the same case the Court further emphasized its holding that the Alabama Homicide Act is a death statute and not a survival statute, and that it has no similarity to the Pennsylvania Survival Act of 1937, by saying (243 Ala. at p. 349, 10 So. 2d at p. 14):

> "The statute providing for survival of actions for 'injuries to the person' does not apply to actions for injuries from wrongful act resulting in death, with a consequent right of action under the Homicide Act. The survival statute has a field of operation in actions where death ensues from other causes. *The lawmakers did not contemplate two actions* by the same administrator *against the same defendant for the same tort*, prosecuted to separate judgments, *one to recover for personal injuries for the benefit of the estate, and another for punitive damages for the benefit of next of kin.*" (Emphasis supplied.)

The Alabama Court has also made it very clear that the Alabama Survival Act, which, of course, is not the act under which petitioner is suing, likewise has no relation to the Pennsylvania Survival Act of 1937. In Alabama a right of action survives and may be continued by the personal representative only if the death ensues from causes other than the accident on which the suit was based. Such a survival act is to that extent similar to Section 35a of the Fiduciaries Act of 1917 (Note 1, p. 7, *supra;* Respond-

ent's Appendix p. 26) but has no similarity whatever to the Pennsylvania Act of 1937, which authorizes personal representatives themselves to bring an action based upon the accident which caused their decedent's death while the separate cause of action under the Act of 1855 is also being prosecuted.

The Supreme Court of Alabama has held that the Homicide Act provides the exclusive remedy where death results from the same wrongful act that is the basis of decedent's suit for personal injuries, and in such case therefore a decedent's action does *not* survive to his personal representative. *Bruce v. Collier*, 221 Ala. 92, 127 So. 553 (1930). Under the Alabama Survival Acts the personal representative may revive a pending suit for personal injuries upon the death of the plaintiff from causes unassociated with his accident and may recover the same damages that the decedent might have recovered; but *if death results from the same negligent act*, the only right of action in the personal representative is not the common law right of the decedent to recover for personal injuries, which is the only right involved in the Pennsylvania Survival Act of 1937, pp. 7-8, *supra*, but the statutory right to recover for wrongful death created by the Homicide Act. Any suit begun by the decedent in his lifetime must be abandoned by his personal representative and, instead, a new suit for wrongful death must be instituted under the Homicide Act. *Parker v. Fies & Sons*, 243 Ala. 348, 350, 10 So. 2d 13, 14 (1942); *Smith v. Lilley*, 252 Ala. 425, 430, 41 So. 2d 175, 179 (1949). Obviously the Homicide Act does not pretend to keep alive any right of action that the decedent might have had. It is not a survival act at all, and the essential nature of the right created by that Act is therefore wholly different from that provided by the Pennsylvania Survival Acts. Compare *Radobersky v. Imperial Vol. Fire Dept.*, 368 Pa. 235, 81 A. 2d 865 (1951).

The Alabama Homicide Act provides only a right of action for wrongful death which is in its essence the same

right of action created by the Pennsylvania Wrongful Death Act of 1855 and is wholly unlike the decedent's common law right of action for personal injuries that is continued in his personal representative under the Pennsylvania Survival Act of 1937. The Courts below were accordingly clearly right in applying the period of limitation provided by the Act of 1855 instead of that provided by the Act of 1937.

Not only has petitioner failed to give consideration to the interpretation of the Alabama statutes by the Supreme Court of Alabama, but she does not even refer to any of them. On page 10 of her petition she merely sets side by side some of the language contained in the Alabama Homicide Act and the Pennsylvania Survival Act of 1937 which provides that the personal representative of the deceased is the proper party plaintiff under both Acts, but she does not quote the portions of the Acts which show how different in substance they are. Again on page 15 she states that "Section 35-b of the Act of 1937 is not identical with Section 123 of the Alabama Code," a fact which is quite obvious even from a cursory examination of the two statutes, but also states that "the Pennsylvania Act of 1855 is still less like the Alabama Act." The latter statement could only be made by ignoring, as petitioner does, the interpretation of the Alabama Act placed on it by the Alabama Court and the interpretation of the Pennsylvania Act placed on it by the Pennsylvania Court. When consideration is given to the pertinent decisions of the Supreme Courts of Alabama and Pennsylvania it becomes clear that the cause of action created by both death statutes is identical and that neither has any similarity to the Pennsylvania Survival Act of 1937.

Even though, as in Pennsylvania, the personal representative of the decedent is the plaintiff, the Alabama cases make it clear that the action under the Homicide Act is brought for the benefit of the next of kin and not for the

estate as such. *Webb v. French*, 228 Ala. 43, 45, 152 So. 215, 217 (1934); *Bruce v. Collier*, 221 Ala. 22, 23, 127 So. 553, 554 (1930). Unlike the Pennsylvania Act of 1937, under which an action must be brought for the benefit of the estate alone, it does not purport to preserve and continue the right of the decedent to recover damages for personal injuries, but, as does the Pennsylvania Act of 1855, it creates a new right of action to recover damages for wrongful death for the benefit of surviving next of kin.

Likewise there is no significance in the words quoted from the Alabama Act by petitioner which provide that the "personal representative may maintain an action . . . if the intestate could have maintained an action for such . . . negligence, if it had not caused death." In her argument she seems to suggest that this phrase is like some language in *Stegner v. Fenton*, 351 Pa. 292, 40 A. 2d 473 (1945) and to imply that the Act therefore resembles the Act of 1937. However, the phrase has been interpreted by the Alabama courts as being merely for the purpose of permitting the pleading in an Alabama action for wrongful death of defenses arising from the participation of the decedent in the tort which resulted in his death, such as contributory negligence and assumption of risk. *Breed v. Atlanta B. & C. R. Co.*, 241 Ala. 640, 645, 4 So. 2d 315, 319 (1942). The phrase is merely an adaptation of a similar qualifying provision in Lord Campbell's Act which was not written into the Pennsylvania Wrongful Death Act but has been embodied therein by judicial interpretation. *Kaczorowski v. Kalkosinski*, 321 Pa. 438, 440, 184 Atl. 663, 664 (1940).

Petitioner's attempt to identify the Alabama Homicide Act with the Pennsylvania Survival Act of 1937 is accordingly without any justification whatever and it remains merely to determine whether the policy of Pennsylvania is to make the one-year period of limitation created by the Act of 1855 applicable not only to causes of action for wrongful death arising in Pennsylvania, but also to those which arise

under the statutes of other States which are sought to be enforced in the Courts of Pennsylvania. The answer to this question is also quite clear, as will now be shown.

IV. In Pennsylvania All Death Actions Are Barred After One Year by the Act of 1855.

The Pennsylvania decision which held that the Act of 1855 provided a period of limitation for all death actions brought in Pennsylvania Courts is *Rosenzweig v. Heller*, 302 Pa. 279, 153 Atl. 346 (1931). That case expresses what is still the law of Pennsylvania, and its holding that the Act of 1855 is a statute of limitation that operates not only on rights of action for wrongful death arising in Pennsylvania but also on those arising in other states which are sought to be enforced in Pennsylvania, has not been changed by the legislature nor has its effect been limited in any way by the courts. Pennsylvania wrongful death actions are still barred if not instituted within one year after the death, *Stafford v. Roadway Transit Co.*, 165 F. 2d 920, 923 (C.A. 3d, 1948); see *Echon v. Pennsylvania Railroad Co.*, 365 Pa. 529, 532, 76 A. 2d 175, 177 (1950), following *Rosenzweig v. Heller;* and foreign wrongful death actions are likewise subject to the one-year limitation provision of the Pennsylvania Wrongful Death Act. See *Foley v. The Pittsburgh-Des Moines Co.*, 363 Pa. 1, 10, 68 A. 2d 517, 521 (1949), following *Rosenzweig v. Heller.*

The Pennsylvania Court's interpretation of the Wrongful Death Act in *Rosenzweig v. Heller* is expressive of a state policy which, under the federal diversity jurisdiction, it is the duty of Federal Courts to enforce. *Angel v. Bullington*, 330 U. S. 183, 191 (1947); *Regan v. Merchants Transfer & Warehouse Co.*, 337 U. S. 530 (1949). The object of the diversity jurisdiction is to insure that "the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a state court." *Guaranty Trust Co. v. York*, 326 U. S. 99, 109 (1945). Thus, state statutes of limitation are given the

same effect in the federal courts as they would be given in the state courts. *Guaranty Trust Co. v. York, supra; Regan v. Merchants Transfer & Warehouse Co., supra.*

It is precisely that result which was accomplished by the judgment of the lower court in this case which prevented recovery on a foreign right of action for wrongful death where suit was instituted later than the period permitted in Pennsylvania. Any other disposition would have achieved the anomaly of allowing recovery to the plaintiff because the accident happened in Alabama, although if it had occurred in Pennsylvania she would have been barred from enforcing in the courts of that state her right of action for wrongful death.

Although in her first "Question Involved" petitioner says that "a Pennsylvania Statute gives a similar right to the personal representative, also with a two year limitation," implying that the "similar right" is a right similar to the right given by the Alabama Homicide Act under which she brought her suit, the cases heretofore considered (pp. 8 to 10, *supra*) show how misleading such a statement is.

Similarly on page 7 she says that Section 35(b) of the Act of 1937 gave the administratrix of a decedent killed in Pennsylvania *a* remedy available on April 19, 1950, without pointing out that the remedy so given was under the Survival Act of 1937 alone and not under the Death Act of 1855, and therefore was wholly unlike the remedy granted by the Alabama Homicide Act. Continuing, petitioner asserts obliquely that she was denied a remedy "similar" to that granted by the Act of 1937 "because her decedent was killed in Alabama," although it is quite clear that the right she sought to assert was not similar to the Pennsylvania Survival Act of 1937 at all but was similar only to the Pennsylvania Death Act of 1855, and that she was not denied any right "because her decedent was killed in Alabama" but solely because the Act of 1855 barred any death action such as was created by the Alabama Homicide Act if not brought within one year after the death. See Petitioner's Appendix, pp. 2a, 3a and 5a.

Throughout her petition, petitioner constantly makes statements which are only half truths and which, if applied to the Pennsylvania Act of 1855, the only Pennsylvania Act comparable to the Alabama Homicide Act under which she sued, are not true at all. Thus on page 15 of her petition she says "There can be no doubt that the public policy of Pennsylvania is to allow a two-year period for suits by the personal representative of one killed by negligent act who has not brought suit during his lifetime." If that statement be limited to the Survival Act of 1937, it is true, but if it be limited to the Death Act of 1855, it is false. (See p. 9, *supra*.) The confusion of petitioner's argument stems entirely from her failure to differentiate, as the Pennsylvania Courts have done, between the Acts of 1855 and 1937. As soon as that is done the sole basis for her argument vanishes.

V. The Full Faith and Credit Clause Does Not Affect Pennsylvania's Limitation of Foreign Wrongful Death Actions.

In the section of her petition based upon the Full Faith and Credit Clause of the Constitution petitioner continues merely to half-state the law of Pennsylvania and to ignore the difference between the Wrongful Death Act and the Survival Act. Thus, on page 16 she says that she was denied a remedy because her decedent was "killed in a sister state although recovery would be permitted under identical circumstances if the accident had happened in Pennsylvania," and again that she was required to bring suit within one year of the death of her decedent "whereas two years would have been allowed had the accident occurred in Pennsylvania." These statements are grossly deceptive. Obviously the petitioner could have brought and maintained a suit in Pennsylvania within two years if it had been a survival action alone, but the Alabama law creates no cause of action similar to that established in Pennsylvania by the Survival Act of 1937, and it is of course obvious that

petitioner has no right of action at all unless it is created by the law of Alabama. The District Court did not dismiss her suit because the death occurred in Alabama but because the only right of action created by Alabama law was a death action. Had the law of that state also created a survival action, which it has not, such an action could have been brought in Pennsylvania within two years after the death, but even if the death had occurred in Pennsylvania, petitioner could not have maintained a *death* action in Pennsylvania unless suit had been brought within one year after the death. Thus the statement appearing on page 16 of the petition that "if the accident had happened here (in Pennsylvania) . . . recovery would have been permitted" is false if applied to the only kind of recovery authorized by the Act under which petitioner sued, and true only if applied to an Act the like of which does not exist in Alabama and under which therefore petitioner's present action could not have been brought. Pennsylvania allows anyone, resident or non-resident, to bring a wrongful death action within one year and a survival action within two years, but plays no favorites and applies the same rules to all alike.

The decision below merely prevents the petitioner from bringing a death action in Pennsylvania later than a Pennsylvania resident could have brought a death action for a death occurring in Pennsylvania, and petitioner's statement on page 18 of her petition that "as construed by the Court below, the law of Pennsylvania, while allowing two years for suit by an administratrix whose decedent is killed in Pennsylvania, allows but one year if such killing is in Alabama" is merely another instance of her speaking of two entirely separate and distinct causes of action while giving the false impression that she is speaking only of one. However, petitioner obviously considers it necessary to create the confusion which arises from appearing to talk about the Act of 1855 while really speaking of the Act of 1937, since only by so doing can it be made to seem that

the Pennsylvania rule works one way for residents and another way for non-residents, and, without such a foundation, her argument based upon *Hughes v. Fetter*, 341 U. S. 609 (1951), falls to the ground.

The only thing that was decided in *Hughes v. Fetter* was that a state which has a wrongful death statute of its own cannot completely close the doors of its courts against a suit based upon a similar statute of another state. *Id.* at p. 611. The decision in that case turned on the fact that the statutory policy declared by the Wisconsin Supreme Court violated the Full Faith and Credit Clause because, while entertaining wrongful death actions for locally caused deaths, it excluded those of foreign origin. *Id.* at p. 612. That situation is fundamentally different from that in *Rosenzweig v. Heller*, p. 16 *supra*, in which the Pennsylvania Supreme Court applied the *same* statute of limitations to Pennsylvania and foreign death actions *alike*, and from this case, in which the District Court imposed the one-year limitation provision of the Pennsylvania Wrongful Death Act exactly as it would have been bound to do if the accident had occurred in Pennsylvania.

Thus neither *Hughes v. Fetter* nor *First National Bank of Chicago v. United Airlines, Inc.*, 342 U. S. 396 (1952), which followed it, has any bearing whatever on the present case, in which the plaintiff has been treated in the same way as a Pennsylvania resident would have been treated in the same circumstances.

In neither of those cases was there any intimation that the Full Faith and Credit Clause affected in any way the operation of the rule, which was first established by this Court over one hundred years ago, that the period of limitation of the forum is controlling, even though shorter than that granted by the state where the cause of action arose.

An early illustration of this rule is the case of *McElmoyle v. Cohen*, 13 Pet. 312 (1839), and it was re-affirmed in *Bank of Alabama v. Dalton*, 9 How. 522 (1850) and *Bacon et al. v. Howard*, 20 How. 22 (1857). Cf. also *Bank of the*

United States v. Donnally, 8 Pet. 361, 372 (1834), and *Order of Travelers v. Wolfe*, 331 U. S. 586, 607 (1947).

It is according clear that this Court has long given full effect to the statutes of limitations of the several states and held that, even though a claim was still not barred under the law of the state in which it arose, it could not be enforced in another state after the period of limitation fixed by the laws of such state.

This is in accord with the *Restatement of Conflict Laws* § 397, Comment (b), and is not in any sense inconsistent with the cases of *Hughes v. Fetter* and *First National Bank of Chicago v. United Airlines*. Those cases held invalid statutes which made the courts of one state unavailable *at all* to litigants whose cause of action arose in another state even though, had a like cause of action arisen locally, the courts would have entertained it; but it was not suggested in either case that a state could not put a time limit on the exercise of a right in its own courts, so long as the same limit applied equally to residents of the limiting state.

The additional emphasis given by *Erie Railroad Co. v. Tompkins*, 304 U. S. 64 (1938), and the cases which followed it, to the elimination of both procedural and substantive differences between the remedy afforded by federal courts in diversity cases and that available in the state courts, is wholly inconsistent with the idea of exempting foreign plaintiffs in diversity cases from the effects of local statutes of limitation. Compare the statement appearing in *Klaxon Co. v. Stentor Co.*, 313 U. S. 487, 496 (1941), that "The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in co-ordinate state and federal courts sitting side by side," since, as said by the Court in *Woods v. Interstate Realty Co.*, 337 U. S. 535, 538 (1949), "For the purposes of diversity jurisdiction a federal court is 'in effect, only another court of the state . . . '".

In *Pacific Ins. Co. v. Comm'n.*, 306 U. S. 493, 502 (1939), it was said:

> "And in the case of statutes, the extra-state effect of which Congress has not prescribed, as it may under the constitutional provision, we think the conclusion is unavoidable that *the full faith and credit clause does not require one state to substitute for its own statute*, applicable to persons and events within it, *the conflicting statute of another state*, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events." (Emphasis supplied.)

Applying this doctrine to statutes of limitations, the Court in *Guaranty Trust Co. v. York*, 326 U. S. 99 (1945), quoted with approval what was said by Judge Hand, dissenting in the court below (p. 111):

> "In my opinion it would be a mischievous practice to disregard state statutes of limitation whenever federal courts think that the result of adopting them may be inequitable. Such procedure would promote the choice of United States rather than of state courts in order to gain the advantage of different laws."

Continuing, the Court itself, in holding that in a diversity case a recovery cannot be had in a federal court sitting in a state whose statute of limitations would have barred the recovery had a suit been brought in the court of such state, said (p. 112):

> "The operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law. Certainly, the fortuitous circumstance of residence out of a State of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident. The source of substantive rights enforced by a federal court under diversity of jurisdiction, it cannot be said too often, is the law of the States."

And following the rules announced by this Court in the foregoing cases the Courts of Appeal, in the only two cases that have been found in which such Courts have considered the question raised by the instant case, have reached the same conclusion. *Hughes v. Lucker*, 174 F. 2d 285 (C. A. 3rd, 1949); *Zellmer v. Acme Brewing Co.*, 184 F. 2d 940 (C. A. 9th, 1950).

VI. Conclusion.

In the present case petitioner is seeking in the Federal Court sitting in Pennsylvania not equal but more favorable treatment than Pennsylvania residents would be entitled to receive in a Pennsylvania Court, and it is accordingly submitted that the petition should be denied.

Respectfully submitted,

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APPENDIX.

STATUTES REFERRED TO IN RESPONDENT'S BRIEF.

Pennsylvania Statutes.

WRONGFUL DEATH ACTS.

Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives may maintain an action for and recover damages for the death thus occasioned. (Act of April 15, 1851, P. L. 669, § 19, 12 P. S. § 1601.)

The persons entitled to recover damages for any injuries causing death shall be the husband, widow, children, or parents of the deceased, and no other relatives; and that such husband, widow, children or parents of the deceased shall be entitled to recover, whether he, she or they be citizens or residents of the Commonwealth of Pennsylvania, or citizens or residents of any other State or place subject to the jurisdiction of the United States, or of any foreign country, or subjects of any foreign potentate; and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without liability to creditors under the laws of this Commonwealth. If none of the above relatives are left to survive the decedent, then the personal representative shall be entitled to recover damages for reasonable hospital, nursing, medical, funeral expenses, and expenses of administration necessitated by reason of injuries causing death. (Act of April 26, 1855, P. L. 309, § 1; Act of June 7, 1911, P. L. 678, § 1; as amended by Act of April 1, 1937, P. L. 196, § 1, 12 P. S. (Supp.) § 1602.)

The declaration shall state who are the parties entitled in such action; the action shall be brought within one year after the death, and not thereafter. (Act of April 26, 1855, P. L. 309, § 2, 12 P. S. § 1603.)

SECTION 35(a) OF THE FIDUCIARIES ACT OF 1917.

No personal action hereafter brought, except actions for slander and for libels, and no action for mesne profits or for trespass to real property, shall abate by reason of the death of the plaintiff or the defendant, or by reason of the death of one or more joint plaintiffs or defendants; but the executor or administrator of the deceased party may be substituted as plaintiff or as defendant, as the case may be, and the suit prosecuted to final judgment and satisfaction. (Act of June 7, 1917, P. L. 447, § 35(a); Act of March 30, 1921, P. L. 55, § 1, 20 P. S. Ch. 3, App. § 771.)

ACT OF JULY 2, 1937.

Executors or administrators shall have power, either alone or jointly with other plaintiffs, to commence and prosecute all actions for mesne profits or for trespass to real property, and all personal actions which the decedent whom they represent might have commenced and prosecuted, except actions for slander and for libels; and they shall be liable to be sued, either alone or jointly with other defendants, in any such action, except as aforesaid, which might have been maintained against such decedent if he had lived.

All such rights of action which were not barred by the statutes of limitation at the time of the death of decedent may be brought against his executors or administrators at any time within one year after the death of the decedent, notwithstanding the provisions of any statutes of limitations whereby they would have been sooner barred. (Act of June 7, 1917, P. L. 447, § 35(b); Act of March 30, 1921, P. L. 55, § 1; Act of May 2, 1925, P. L. 442, § 1; Act of July 2, 1937, P. L. 2755, § 2, 20 P. S. Ch. 3, App. § 772.)

Alabama Statutes

Homicide Act.

Action for wrongful act, omission, or negligence causing death. A personal representative may maintain an action, and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence, if it had not caused death. Such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be maintained, though there has not been prosecution, or conviction, or acquittal of the defendant for the wrongful act, or omission, or negligence; and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions. Such action must be brought within two years from and after the death of the testator or intestate. (Tit. 7, Code of Ala. 1940, § 123.)

Survival Acts.

All actions on contracts, express or implied; all personal actions; except for injuries to the reputation, survive in favor of and against the personal representatives. (Tit. 7, Code of Ala. 1940, § 150.)

No action abates by the death or other disability of the plaintiff or defendant, if the cause of action survive or continue; but the same must, on motion, within twelve months thereafter, be revived in the name of or against the legal representative of the deceased, his successor or party in interest; or the death of such party may be suggested upon the record, and the action proceed in the name of or against the survivor. (Tit. 7, Code of Ala. 1940, § 153.)

IN THE

Supreme Court of the United States

No. 394.

October Term, 1952.

ROBERTA WELLS, As Administratrix of the Estate of CHEEK WELLS,

Petitioner,

v.

SIMONDS ABRASIVE COMPANY,

Respondent.

On Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

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IN THE

Supreme Court of the United States.

No. 394, October Term, 1952.

ROBERTA WELLS, AS ADMINISTRATRIX OF THE ESTATE OF CHEEK WELLS,

Petitioner,

v.

SIMONDS ABRASIVE COMPANY,

Respondent.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is reported in 102 F. Supp. 519.

The opinions of the Court of Appeals for the Third Circuit are reported in 195 F. 2d 814.

JURISDICTION.

The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928 (28 U. S. C. § 1254).

QUESTION PRESENTED.

Whether in a diversity action for a wrongful death which occurred in Alabama, brought by an Alabama administratrix in a Federal Court sitting in Pennsylvania, a Federal Court may apply the limitation provision of the forum which is applicable to the cause of action, created by the law of the forum, that is comparable to the foreign statute on which the suit is based, without violating the full faith and credit clause of the United States Constitution.

STATUTES INVOLVED.

The statutes involved are:

The Alabama Homicide Act. Tit. 7, Code of Alabama 1940, Section 123 (Appendix p. 26).

The Alabama Survival Acts. Tit. 7, Code of Alabama 1940, Sections 150 and 153 (Appendix p. 27).

The Pennsylvania Wrongful Death Acts. Act of April 15, 1851, P. L. 669, Section 19, 12 P. S. Section 1601; Act of April 26, 1855, P. L. 309, Sections 1 and 2 (as amended), 12 P. S. Sections 1602 and 1603 (Appendix p. 25).

The Pennsylvania Survival Act. Act of July 2, 1937, P. L. 2755, Section 2, 20 P. S. Ch. 3, App. Section 772 (Appendix p. 26).

The Constitution of the United States, Article IV, Section 1.

ARGUMENT.

Summary.

Alabama has a Wrongful Death Act (Appendix p. 26), known as the Homicide Act, which authorizes a suit for wrongful death to be brought "within the State of Alabama, *and not elsewhere*" within two years after the death. (Emphasis supplied.) Pennsylvania also has a Wrongful Death Act (Appendix p. 25), which authorizes a suit to be brought for wrongful death within one year after the death. Petitioner brought an action under the Alabama Death Act in the United States District Court, sitting in the Eastern District of Pennsylvania, more than one year, and less than two years, after her decedent's death.

The Pennsylvania Courts have held that death actions brought in Pennsylvania for deaths occurring elsewhere must be brought within the one-year period of limitation which is applicable to death actions brought in Pennsylvania to recover for deaths occurring in that state. This being a diversity case the Courts below applied the Pennsylvania rule and held that, since the suit could not have been maintained in a Pennsylvania court because brought more than one year after the death, it could not be maintained in a Federal court sitting in Pennsylvania.

Unlike Alabama, Pennsylvania also has, in addition to its Death Statute, what is known as a Survival Statute (Appendix p. 26), which merely continues in the personal representatives of one who has died as a result of injuries, the right of action which accrued to the deceased at common law because of the tort. The parties for whose benefit this action may be brought are different from those entitled to be compensated in a death action, and the action may be brought within two years after the death instead of within the one year period prescribed for the Death Statute. There

is no comparable statute in Alabama and no such right of action exists under its laws.

Completely ignoring the difference between the two statutes, the Death Statute and the Survival Statute, and the different rights of action which they create, differences which the Pennsylvania courts have always scrupulously observed, petitioner is seeking to gain in her death action the benefit of the two-year period of limitation of the Pennsylvania Survival Act and thereby avoid the one-year limitation of the Death Act. Since the Alabama Death Act finds its Pennsylvania counterpart in the Pennsylvania Death Act, and not in the Pennsylvania Survival Act, the Courts below held that a suit brought in Pennsylvania based upon the right of action created by the Alabama Death Act must be brought within the one-year period of limitation of the Pennsylvania Death Act.

It is submitted that in so holding the Courts below did no violence to the Full Faith and Credit Clause of the Constitution.

I. The Alabama Act.

The Alabama Act (Appendix p. 26), under which the petitioner brought her suit, is a death act and not a survival act. The Alabama courts have consistently so declared. *Smith v. Lilley*, 252 Ala. 425, 430, 41 So. 2d 175, 179 (1949); *Parker v. Fies & Sons*, 243 Ala. 348, 350, 10 So. 2d 13, 15 (1942); *Bruce v. Collier*, 221 Ala. 22, 23, 127 So. 553, 554 (1930); *Webb v. French*, 228 Ala. 43, 45, 152 So. 215, 217 (1934); *Kennedy v. Davis*, 171 Ala. 609, 612, 55 So. 104, 105 (1911). The nature of the right created by the Alabama Act is succinctly stated in *Parker v. Fies & Sons*, *supra* (243 Ala. at p. 350, 10 So. 2d at p. 15):

> "*Our Homicide Act is a death statute*, a punitive Statute to prevent homicides. *It creates a new and distinct cause of action, unknown at common law. The cause of action comes into being only upon death from wrongful act.*

"These concepts are so fully settled that further statement need not be indulged. Breed v. Atlanta B. & C. R. Co., 241 Ala. 640, 4 So. 2d 315; Pickett v. Matthews, 238 Ala. 542, 192 So. 261; Anno. Code of 1940, Title 7 § 123." (Emphasis supplied.)

In the same case the Court further emphasized its holding that the Alabama Homicide Act is a death statute and not a survival statute, and that it has no similarity whatever to the Pennsylvania Survival Act, the nature of which was clearly defined in *Piacquadio v. Beaver Valley Service Co.*, 355 Pa. 183, 185, 49 A. 2d 406, 407 (1946), by saying (243 Ala. at p. 349, 10 So. 2d at p. 14):

"The statute providing for survival of actions for 'injuries to the person' does not apply to actions for injuries from wrongful act resulting in death, with a consequent right of action under the Homicide Act. The survival statute has a field of operation in actions where death ensues from other causes. *The lawmakers did not contemplate two actions* by the same administrator *against the same defendant for the same tort* prosecuted to separate judgments, *one to recover for personal injuries for the benefit of the estate, and another for punitive damages for the benefit of next of kin.*" (Emphasis supplied.)

As appears from the foregoing statement, Alabama also has an Act called a Survival Act (Appendix p. 27), which, however, is not the Act under which the petitioner is suing and which has no relation at all to the Pennsylvania Survival Act. Under that Alabama Act a right of action survives and may be continued by the personal representative, but *only* if the death ensues from causes other than the accident on which the suit was based. Thus the Alabama Survival Act likewise has no similarity whatever to the Pennsylvania Survival Act, which authorizes personal representatives themselves to bring an action based upon the accident which caused their decedent's death while the sepa-

rate cause of action under the Pennsylvania Death Act is also being prosecuted. *Pezzuli v. D'Ambrosia*, 344 Pa. 643, 26 A. 2d 659 (1942).

The Supreme Court of Alabama has held that the Homicide Act provides the exclusive remedy where death results from the same wrongful act that is the basis of decedent's suit for personal injuries, and in such case, therefore, a decedent's action does *not* survive to his personal representative. *Bruce v. Collier*, 221 Ala. 22, 127 So. 553 (1930). Under the Alabama Survival Acts the personal representative may revive a pending suit for personal injuries upon the death of the plaintiff from causes unassociated with his accident and may recover the same damages that the decedent might have recovered; but *if death results from the same negligent act*, the only right of action in the personal representative is *not* the common law right of the decedent to recover for personal injuries, which is the only right involved in the Pennsylvania Survival Act, *Pezzuli v. D'Ambrosia*, 344 Pa. 643, 26 A. 2d 659 (1942), but the statutory right to recover for wrongful death created by the Homicide Act. In such circumstances any suit begun by the decedent in his lifetime must be abandoned by his personal representative, and, unlike Pennsylvania, *Id.* at pp. 646, 660, a new suit for wrongful death must be instituted instead under the Homicide Act. *Parker v. Fies & Sons*, 243 Ala. 348, 350, 10 So. 2d 13, 14 (1942); *Smith v. Lilley*, 252 Ala. 425, 430, 41 So. 2d 175, 179 (1949). Obviously the Homicide Act does not pretend to keep alive any right of action that the decedent might have had. It is not a survival act at all, and the essential nature of the right created by that Act is therefore wholly different from that provided by the Pennsylvania Survival Act. Compare *Rudobersky v. Imperial Vol. Fire Dept.*, 368 Pa. 235, 81 A. 2d 865 (1951).

The Alabama Homicide Act, under which petitioner brought her suit, provides only a right of action for wrongful death, which is the same right of action created by the

Pennsylvania Wrongful Death Act and is wholly unlike the decedent's common law right of action for personal injuries that is continued in his personal representative under the Pennsylvania Survival Act. The Courts below were accordingly clearly right in applying the period of limitation provided by the Pennsylvania Death Act instead of that provided by the Pennsylvania Survival Act.

II. The Pennsylvania Act.

The Pennsylvania Wrongful Death Act (Appendix p. 25), consists of statutes enacted in 1851 and 1855, which, in Pennsylvania, are treated together as one Act. Suit must be brought within one year after death "and not thereafter". This is the only statutory basis for the "true action for wrongful death." *Goodrich-Amram Procedural Rules Service*, § 2201-38. It establishes a right of action in certain named beneficiaries to recover damages accruing to them because of the decedent's death. *Pezzulli v. D'Ambrosia*, 344 Pa. 643, 647, 26 A. 2d 659, 661 (1942); *Funk v. Buckley & Co., Inc.*, 158 Pa. Super. Ct. 586, 590, 45 A. 2d 918, 920 (1946). Under Pa. R. C. P. 2202(a), actions for wrongful death are brought, as are survival actions, by the decedent's personal representative.

The Pennsylvania Survival Act of 1937 (Appendix p. 26), provides for the commencement and prosecution by the personal representative of an action for fatal injuries to the decedent, which, as the Supreme Court of Alabama has said cannot be done under The Alabama Survival Act (*supra*, pp. 5-6), may be prosecuted by the same administrator against the same defendant to a separate judgment to recover damages for the benefit of the estate, at the same time that he is prosecuting another action for damages for the benefit of next of kin. This is not a "death statute" in any sense of the word but merely enables the decedent's personal representative to bring a separate suit, which is unknown to the law of Alabama, on the right of

action for personal injuries that had accrued to the decedent at common law because of the tort. *Pezzulli v. D'Ambrosia*, 344 Pa. 643, 647, 26 A. 2d 659, 661 (1942); *Piacquadio v. Beaver Valley Service Co.*, 355 Pa. 183, 185, 49 A. 2d 406, 407 (1946); *Funk v. Buckley & Co., Inc.*, 158 Pa. Super. Ct. 586, 591, 45 A. 2d 918, 920 (1946).

The Pennsylvania courts have always recognized a clear distinction between the right of action for wrongful death and the right of action under the Survival Act of 1937. *Pezzulli v. D'Ambrosia*, 344 Pa. 643, 647, 26 A. 2d 659, 661 (1942); *Stegner v. Fenton*, 351 Pa. 292, 294, 40 A. 2d 473, 474 (1945); *Piacquadio v. Beaver Valley Service Co.*, 355 Pa. 183, 185, 49 A. 2d 406, 407 (1946); *Murray v. P. T. C.*, 359 Pa. 69, 71, 58 A. 2d 323, 324 (1948); *Ferne v. Chadderton*, 363 Pa. 191, 197, 69 A. 2d 104, 107 (1949); *Funk v. Buckley & Co., Inc.*, 158 Pa. Super. Ct. 586, 590, 45 A. 2d 918, 920 (1946). In *Pezzulli v. D'Ambrosia, supra*, the distinction was defined by the Court in the following passage (344 Pa. at p. 647, 26 A. 2d at p. 660):

> "Under the present statutory law of Pennsylvania, if a suit for personal injuries is not brought during his life by the person injured *two* actions may be brought after his death (as they were in the present instance) for the recovery of damages—*one* under the acts of 1851 (section 19) and 1855, *the other* under the act of 1937. *Such actions are entirely dissimilar in nature.* The one represents a cause of action unknown to the common law and is for the benefit of certain enumerated relatives of the person killed by another's negligence; the damages recoverable are measured by the pecuniary loss occasioned to them through deprivation of the part of the earnings of the deceased which they would have received from him had he lived. The other is not a new cause of action at all, but merely continues in his personal representatives the right of action which accrued to the deceased at common law because of the tort; . . ." (Emphasis supplied.)

This distinction has, of course, been extended to the limitation provisions applicable to suits arising under these Acts. In *Stegner v. Fenton*, 351 Pa. 292, 40 A. 2d 473 (1945), the Supreme Court of Pennsylvania traced their history and held that suits under the Survival Act of 1937 are subject to the two-year statute of limitations while actions under the Wrongful Death Act are subject to its one-year limitation provision. *Id.* at pp. 296, 475. In reaching this conclusion the Court said (351 Pa. at p. 295, 40 A. 2d at p. 475):

> "*By no stretch of imagination* can the provisions of that act [the Act of 1855] be grafted upon the '*survival*' Act of 1937, supra, which was passed for an entirely different purpose. *The Acts of 1851 and 1855, supra, are 'death' statutes, not 'survival' acts.*" (Emphasis supplied.)

In *Piacquadio v. Beaver Valley Service Co.*, 355 Pa. 183, 49 A. 2d 406 (1946), the Supreme Court of Pennsylvania held that a complaint in a wrongful death action could not be amended more than two years after the injury to include an action for damages under the Act of 1937. The Court distinguished the two types of action in the following language (355 Pa. at p. 185, 49 A. 2d at p. 407):

> "Although they arise out of a common factual background, *the death action under the Acts of 1851 and 1855, is a separate and distinct cause of action from the cause of action for the decedent's injuries which survives his death under the Act of 1937.* 'The one represents a cause of action unknown to the common law and is for the benefit of certain enumerated relatives of the person killed by another's negligence . . . The other is not a new cause of action at all, but merely continues in his personal representatives the right of action which accrued to the deceased at common law because of the tort' . . . *Different statutes of limitation apply to the two causes of action. The one-year limitation of the*

Wrongful Death Act is not applicable to a suit brought pursuant to the Survival Act." (Emphasis supplied.)

The Supreme Court of Pennsylvania has consistently recognized the distinction between the rights of action under the Wrongful Death Act of 1855 and the Survival Act of 1937, not only in respect of the measure of damages recoverable under each, but also of the separate periods of limitation that are applicable to them. See also *Ferne v. Chadderton*, 363 Pa. 191, 197, 69 A. 2d 104, 107 (1949); *Fisher v. Hill*, 368 Pa. 53, 60, 81 A. 2d 860, 864 (1951). And it has continued to enforce, as it must in the absence of legislative modification, the one-year limitation provision of the Wrongful Death Act. See *Echon v. Pennsylvania Railroad Co.*, 365 Pa. 529, 532, 76 A. 2d 175, 177 (1950); *Foley v. The Pittsburgh-Des Moines Co.*, 363 Pa. 1, 9, 68 A. 2d 517, 521 (1949).

Petitioner, however, basing her argument on a misconception of the Pennsylvania law, as was pointed out by the Court below in its opinion on the petition for rehearing (R. 25), is trying to have applied to her action under the Death Statute the period of limitation applicable to an entirely different statute which creates a different right of action for the benefit of a different class of persons.

III. In Pennsylvania All Death Actions Are Alike Held Subject to the One Year Limitation of the Death Act of 1855.

The Pennsylvania decision which held that the Act of 1855 provided the period of limitation for all death actions brought in Pennsylvania Courts is *Rosenzweig v. Heller*, 302 Pa. 279, 153 Atl. 346 (1931). That case expresses what is still the law of Pennsylvania, and holds that the Act of 1855 is a statute of limitation that operates not only on rights of action for wrongful death arising in Pennsylvania but also on those arising in other states which are sought

to be enforced in Pennsylvania. Pennsylvania wrongful death actions are barred if not instituted within one year after the death, *Stafford v. Roadway Transit Co.*, 165 F. 2d 920, 923 (C. A. 3d, 1948); see *Echon v. Pennsylvania Railroad Co.*, 365 Pa. 529, 532, 76 A. 2d 175, 177 (1950), following *Rosenzweig v. Heller;* and foreign wrongful death actions are likewise subject to the one-year limitation provisions of the Pennsylvania Wrongful Death Act. See *Foley v. The Pittsburgh-Des Moines Co.*, 363 Pa. 1, 10, 68 A. 2d 517, 521 (1949), following *Rosenzweig v. Heller.*

It was for the very reason that Pennsylvania law and Pennsylvania courts treat all litigants alike and apply the one-year period of limitation to all death actions brought in Pennsylvania, whether the cause of action arose in Pennsylvania or elsewhere, that the Court below, in an opinion filed October 21, 1952, not yet reported (Appendix p. 28), in the case of *Quinn, Administratrix v. Simonds Abrasive Co.*, held again that to apply the Pennsylvania one-year limitation in a diversity case based on a death occurring in Ohio did not violate the full faith and credit clause because there was no discrimination.

In that case it was not possible for the plaintiff to confuse, as the petitioner has sought to do here, the Pennsylvania Survival Act with the Pennsylvania Death Act and thereby to assert a similarity between the Pennsylvania Survival Act and the foreign death act, since in Ohio, as in Pennsylvania, there is both a Wrongful Death Act, 7 Ohio Gen. Code Ann. § 10509-166, and a Survival Act, 8 Ohio Gen. Code Ann. § 11235. However, since it was clear in that case, as in this, that the foreign death act was a true wrongful death statute, *Rodney v. Staman,* 371 Pa. 1, 4, 89 A. 2d 313, 315 (1952), the same principle was applicable and the Court accordingly held that the one-year limitation of the Pennsylvania Death Act barred the action.

IV. The Full Faith and Credit Clause Has Not Been Violated.

The Pennsylvania Court's interpretation of the Wrongful Death Act in *Rosenzweig v. Heller* is expressive of a state policy which, far from being in conflict with the Full Faith and Credit clause of the Constitution, is of the kind which has heretofore been held, under the federal diversity jurisdiction, to be the duty of Federal Courts to enforce. *Angel v. Bullington*, 330 U. S. 183, 191 (1947); *Regan v. Merchants Transfer & Warehouse Co.*, 337 U. S. 530 (1949). The object of the diversity jurisdiction is to insure that "the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a state court." *Guaranty Trust Co. v. York*, 326 U. S. 99, 109 (1945). Thus, state statutes of limitation are given the same effect in the federal courts as they would be given in the state courts. *Guaranty Trust Co. v. York, supra; Regan v. Merchants Transfer & Warehouse Co., supra.*

It is precisely that result which was accomplished by the judgment of the lower court in this case, which prevented recovery on a foreign right of action for wrongful death where suit was instituted later than the period permitted in Pennsylvania. Any other disposition would have achieved the result of allowing recovery by the petitioner because the accident happened in Alabama, although if it had occurred in Pennsylvania she would have been barred from enforcing in the Pennsylvania courts her right of action for wrongful death.

What was decided in *Hughes v. Fetter*, 341 U. S. 609 (1951) was that a state which has a wrongful death statute of its own cannot completely close the doors of its courts against a suit based upon a similar statute of another state. *Id.* at p. 611. The decision in that case turned on the fact that the statutory policy declared by the Wisconsin Supreme Court violated the Full Faith and Credit Clause because, while entertaining wrongful death actions for locally caused deaths, it excluded those of foreign origin. *Id.* at p.

612. That situation is fundamentally different from that in *Rosenzweig v. Heller*, p. 10 *supra*, in which the Pennsylvania Supreme Court applied the *same* statute of limitations to Pennsylvania and foreign death actions *alike*; and from that in this case, in which the District Court imposed the one-year limitation provision of the Pennsylvania Wrongful Death Act exactly as it would have been bound to do if the accident had occurred in Pennsylvania.

Thus the decisions in *Hughes v. Fetter* and in *First National Bank of Chicago v. United Airlines, Inc.*, 342 U. S. 396 (1952), which followed it, are not at variance with the decision of the Courts below in the present case, in which the petitioner has been treated in the same way as a Pennsylvania resident would have been treated in the same circumstances.

Since the rule was first established by this Court over one hundred years ago, no case has held that the Full Faith and Credit Clause was violated by a decision that the period of limitation of the forum is controlling, even though shorter than that granted by the state where the cause of action arose. See *McElmoyle v. Cohen*, 13 Pet. 312 (1839); *Townsend v. Jemison*, 9 How. 407 (1850); *Bank of Alabama v. Dalton*, 9 How. 522 (1850); *Bacon, et al. v. Howard*, 20 How. 22 (1857). Cf. also *Bank of the United States v. Donnally*, 8 Pet. 361, 372 (1834), and *Order of Travelers v. Wolfe*, 331 U. S. 586, 607 (1947).

It is accordingly clear that this Court has long given full effect to the statutes of limitations of the several states and held that, even though a claim was still not barred under the law of the state in which it arose, it could not be enforced in another state after the period of limitation fixed by the laws of such state.

This is in accord with the *Restatement of Conflict of Laws* § 397, Comment (b), and § 603, and is not in any sense inconsistent with the cases of *Hughes v. Fetter* and *First National Bank of Chicago v. United Airlines*. Those cases held invalid statutes which made the courts of one state

unavailable *at all* to litigants whose cause of action arose in another state even though, had a like cause of action arisen locally, the courts would have entertained it; but it was not suggested in either case that a state could not put a time limit on the exercise of a right in its own courts, so long as the same limit applied equally to residents of the limiting state.

The additional emphasis given by *Erie Railroad Co. v. Tompkins*, 304 U. S. 64 (1938), and the cases which followed it, to the elimination of both procedural and substantive differences between the remedy afforded by federal courts in diversity cases and that available in the state courts, is wholly inconsistent with the idea of exempting foreign plaintiffs in diversity cases from the effects of local statutes of limitation. Compare the statement appearing in *Klaxon Co. v. Stentor Co.*, 313 U. S. 487, 496 (1941), that "The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in co-ordinate state and federal courts sitting side by side," since, as said by the Court in *Woods v. Interstate Realty Co.*, 337 U. S. 535, 538 (1949), "For the purposes of diversity jurisdiction a federal court is 'in effect, only another court of the state . . .'".

In *Pacific Ins. Co. v. Comm'n.*, 306 U. S. 493, 502 (1939), it was said:

> "And in the case of statutes, the extra-state effect of which Congress has not prescribed, as it may under the constitutional provision, we think the conclusion is unavoidable that *the full faith and credit clause does not require one state to substitute for its own statute*, applicable to persons and events within it, *the conflicting statute of another state*; even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events." (Emphasis supplied.)

Speaking of the desirability of uniformity in the operation of statutes of limitations, this Court in *Guaranty Trust Co. v. York*, 326 U. S. 99 (1945), quoted with approval what was said by Judge Hand, dissenting in the court below (p. 111):

> "In my opinion it would be a mischievous practice to disregard state statutes of limitation whenever federal courts think that the result of adopting them may be inequitable. Such procedure would promote the choice of United States rather than of state courts in order to gain the advantage of different laws."

Continuing, the Court itself, in holding that in a diversity case a recovery cannot be had in a federal court sitting in a state whose statute of limitations would have barred the recovery had a suit been brought in the court of such state, said (p. 112):

> "The operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law. Certainly, the fortuitous circumstance of residence out of a State of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident. The source of substantive rights enforced by a federal court under diversity of jurisdiction, it cannot be said too often, is the law of the States."

It was in the observance of the principles announced by this Court in the foregoing cases that the only two Courts of Appeal that have considered the question raised by the instant case have reached the same conclusion. *Hughes v. Lucker*, 174 F. 2d 285 (C. A. 3rd, 1949); *Zellmer v. Acme Brewing Co.*, 184 F. 2d 940 (C. A. 9th, 1950). And it was because of its understanding application of the Pennsylvania law in the distinctions it makes between death actions and survival actions, and in the full knowledge that the separate periods of limitation applicable under the Death Act and Survival Act are applicable to residents and non-

residents alike and without discrimination, that the Court below has twice within the year rejected the argument made by the petitioner here because of its faulty premise (R. 25; Appendix p. 28).

V. Petitioner's Argument.

Petitioner's entire argument is based, as was her petition for rehearing in the Court below, "on an entirely erroneous conception" of the Pennsylvania Survival Act of 1937 (R. 25). She confuses the Pennsylvania Survival Act of 1937 with the Pennsylvania Death Acts of 1851 and 1855, claiming that the Act of 1937 gives a complete remedy in Pennsylvania for wrongful death. As pointed out by the Court below (R. 25) "The Supreme Court of Pennsylvania has explicitly ruled to the contrary and has held that the Acts of 1851 and 1855, known as the Death Acts, alone make recoverable the type of damages described by the plaintiff."

In her misinterpretation of the Pennsylvania law petitioner has made throughout her brief a number of totally unwarranted statements. Thus in her statement of the Question Presented she says (brief, p. 2), "An Alabama statute gives to the personal representative of one killed by negligent act in Alabama a direct right of action, with a two-year statute of limitations". This is true; but she also says, "A Pennsylvania statute gives a similar direct right of action to the personal representative of one killed by negligent act in Pennsylvania, also with a two-year limitation." This statement is not true. The direct right of action given by the Alabama statute is a death action which authorizes a recovery "for the benefit of next of kin" but not "for the benefit of the estate". *Parker v. Fies & Sons*, 243 Ala. 348, 349, 10 So. 2d 13, 14 (1942). The similar right of action given by a Pennsylvania statute is that given by the Death Act of 1851, which has a one-year limitation under the Act of 1855. It is the Survival Act of 1937 that has the two-year limitation; but that is an entirely dissimilar statute, which gives a different right of action to different people

for the benefit of the estate of the deceased. Thus the Supreme Court of Pennsylvania has said in *Pezzuli v. D'Ambrosia*, 344 Pa. 643, 647, 26 A. 2d 659, 660 (1942), that actions brought under the Act of 1851 and 1855 and under the Act of 1937 "are entirely dissimilar in nature" and in *Stegner v. Fenton*, 351 Pa. 292, 295, 40 A. 2d 473, 475 (1945), that

> "By no stretch of imagination can the provisions of that act [the Act of 1855] be grafted upon the 'survival' Act of 1937, supra, which was passed for an entirely different purpose. The Acts of 1851 and 1855, supra, are 'death' statutes, not 'survival' acts."

And in *Piacquadio v. Beaver Valley Service Co.*, 355 Pa. 183, 185, 49 A. 2d 406, 407 (1946), the same court said:

> "Different statutes of limitation apply to the two causes of action. The one-year limitation of the Wrongful Death Act is not applicable to a suit brought pursuant to the Survival Act."

It is therefore apparent that petitioner's statement in her Specification of Errors (brief, p. 5) that her suit "would also have been in time if brought in Pennsylvania had the accident occurred in that State," is directly at variance with the pronouncements of the Supreme Court of Pennsylvania.

In her statement of the summary of her argument petitioner says (brief, p. 6) that the Pennsylvania Act of 1937, the Survival Act, "gives a complete remedy for wrongful death in Pennsylvania". This statement is simply not true. *Pezzuli v. D'Ambrosia*, 344 Pa. 643, 26 A. 2d, 659 (1942); *Kaczorowski v. Kalkosinski*, 321 Pa. 438, 184 Atl. 663 (1940). In *Funk v. Buckley & Co. Inc.*, 158 Pa. Super. Ct. 586, 590, 45 A. 2d 918, 920 (1946), the court said:

> "The Wrongful Death and the Survival actions, although now redressed in one suit . . . are distinct and separate actions, entirely dissimilar in nature, and are cumulative not alternate."

and again, pp. 591, 921:

> "In Wrongful Death cases the suit is based upon the liability of the tort-feasor to decedent's dependents, notwithstanding that now the action is brought for them by the personal representatives. . . . In survival cases, the action enforces the liability of the tort-feasor to the decedent's estate, not to his relatives or his dependents."

On page 8 of her brief petitioner again repeats the incorrect statement that the Pennsylvania Act of 1937 "provides a complete remedy for death through negligence," citing *Murray v. P. T. C.*, 359 Pa. 69, 58 A. 2d 323 (1948). However, far from supporting petitioner's statement, that case related solely to the proper measure of damages recoverable in an action brought under the Act of 1937, but in it the Court expressly recognized the distinction between the Death Act of 1851 and the Survival Act of 1937.

Again on page 13 of her brief petitioner says that the Pennsylvania Act of 1937 "as construed by the Pennsylvania Supreme Court, allows a two-year limitation for actions in Pennsylvania on suits by a personal representative for the wrongful death of his decedent". As pointed out heretofore, *supra*, pp. 8-9, the Pennsylvania Supreme Court has construed the Act of 1937 not as a wrongful death act but as a survival act which "merely continues in his personal representatives the right of action which accrued to the deceased at common law because of the tort". *Pezzuli v. D'Ambrosia*, 344 Pa. 643, 647, 26 A. 2d 659, 660 (1942).

Petitioner cites in support of her statement the case of *Stegner v. Fenton*, 351 Pa. 292, 40 A. 2d 473 (1945). However, that case merely emphasizes petitioner's misunderstanding of the law of Pennsylvania. In it the Court pointed out that actions for "wrongful death" i.e., those authorized by the Act of 1851, were governed by the one-year limitation prescribed by the Act of 1855 but held that:

"Since a suit by a personal representative under the Act of 1937 is identical to that which decedent might have commenced and prosecuted during his lifetime and, therefore, governed by the same measure of damages, it is but logical to conclude . . . ." that it is governed by the two-year limitation which would control the suit had it been "brought by the injured person during his lifetime, ..." 351 Pa. at p. 296, 40 A. 2d at p. 475.

It is accordingly completely unjustified for petitioner to say, as she does on page 13 of her brief that "The existence of the 1937 Act is conclusive that Pennsylvania 'has no real feeling of antagonism' against two-year limitation periods in actions for wrongful death".

Pennsylvania has always had a one-year period of limitation in "actions for wrongful death" and has allowed two years within which to bring a suit only in respect of survival actions, i.e., those that are "identical to that which decedent might have commenced and prosecuted during his lifetime"; but in applying the one-year limitation to death actions Pennsylvania has applied them to all alike, whether the death occurred within or without the state. Thus in *Rosenzweig v. Heller*, 302 Pa. 279, 285, 153 Atl. 346, 348 (1931), the Court said:

"Statutes of limitation should operate equally upon litigants seeking relief in our courts, upon those invoking remedies here for causes of action originating elsewhere, the same as upon those whose rights arise directly in our Commonwealth"

and again on pp. 286, 348, quoting from *Hutchings v. Lamson*, 96 Fed. 720, 721 (C. A. 7th, 1899):

"It would involve serious and possibly absurd consequences, if it were established that a right of action created and governed by the law of Kansas could be enforced in Illinois after the time when, by the law of the latter state, the action had been barred".

That this is still the law of Pennsylvania is apparent from the case of *Foley v. The Pittsburgh-Des Moines Co.*, 363 Pa. 1, 10, 68 A. 2d 517, 522 (1949) where the Court said:

> "As to the Statute of Limitations, a suit on a cause of action created by a statute which limits the time in which an action may be brought must be started within that time, but if the law of the forum provides a shorter period the action must be brought within the period thus prescribed".

It was this rule to which the Courts below gave effect in dismissing the present action. Petitioner has cited no case holding that the application of this rule would violate the Full Faith and Credit clause and the cases cited heretofore on page 13 expressly hold that it does not.

It is obvious that the case of *Engle v. Davenport*, 271 U. S. 33 (1926), cited by petitioner on page 18 of her brief, has no application here. The Congress has the right under its paramount authority to fix the time within which suits may be brought in state courts to redress wrongs about which it has the constitutional right to legislate. However, it has never been held that the legislature of a state may require another state to make judicial process available to its citizens beyond the time within which it would be available to its own. Thus the fact that state courts must conform to periods of limitation set by Congress in respect of rights which it creates is without significance in determining the right of a state to say within what period non-federal rights may be enforced in its courts.

It may also be noted that if petitioner's argument were given full effect she still would have no right to bring a suit in Pennsylvania. The act which created her right of action expressly limited its enforcement to the geographical limits of the State of Alabama and did not purport to create a right that could be enforced elsewhere. It is thus apparent that the Alabama Legislature had no intention of

seeking to impose on other states a period of limitation different from their own, a period which, in this case, would be obnoxious to the public policy of Pennsylvania as declared by its legislature and by its courts.

The cases cited by petitioner in note (17) on page 18 of her brief do not support her argument. In only one of them, *McMillen v. Douglas Aircraft Co.*, was the full faith and credit clause considered, and there the court reached the same conclusion as the Courts below. The other cases which held that the period of limitation of the forum was controlling recognized the power of a state to provide for the limitation of actions brought in its own courts. Those which held that the period of limitation of the state in which the right was created was controlling did so not on the ground that the forum had no power to prescribe a period of limitation which would control the exercise of foreign rights in its courts, but on the ground either that it had not done so or that under its own conflict of laws rule it accepted the limitation of the state which created the right.

Petitioner also refers to the Judicial Code as amended in 1948 (brief, p. 9) but does not rely on it in support of her position. However, the 1948 amendment to the Judicial Code merely made the language of the third paragraph of the Section, 28 U. S. C. § 1738, conform to the language of the Full Faith and Credit clause. Thus nothing was added by the amendment which did not already exist in the Clause itself. Since the absence of the word "acts" in any Act of Congress was not considered in any of the cases heretofore cited (pp. 12-15) to be an impediment to a determination by this Court of the applicability to state statutes of the Full Faith and Credit Clause, and specifically that the limitation of the forum was controlling even though the law of the state creating the right provided a longer period, it is submitted that the 1948 amendment made no change in the law. Merely making the statute conform to the language of

the Full Faith and Credit clause should not alter the effect of the Clause that has heretofore uniformly been ascribed to it. It did not need any implementation. See Mr. Justice Jackson's article, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Columbia Law Review 1, 11. And certainly the use of the same word, "acts", which appears in the Constitution, should not be interpreted differently now that it also appears in the Judicial Code.

Not only is there no need to interpret it differently but it would create a manifest hardship, in addition to a drastic change in the law, if the forum were required to act in respect of its own citizens contrary to its own public policy in order to give effect to the policy of another state. States have not been required so to act heretofore. See *Atchison, Topeka & Sante Fe Ry. v. Sowers*, 213 U. S. 55, 67-8 (1909); *Bradford Electric Co. v. Clapper*, 286 U. S. 145, 160 (1932); *Klaxon Co. v. Stentor Co.*, 313 U. S. 487, 498 (1941). And such a requirement would seem to be particularly inappropriate in respect of an act, such as the Alabama Homicide Act, which the legislature of such other state had declared should have no extraterritorial effect.

In *Griffin v. McCoach*, 313 U. S. 498 (1941), it was said, p. 507:

> "Where this Court has required the state of the forum to apply the foreign law under the full faith and credit clause or under the Fourteenth Amendment, it has recognized that a state is not required to enforce a law obnoxious to its public policy."

It would be obnoxious not only to the public policy of Pennsylvania but to the practice which has had uniform approval for over 100 years to hold a resident of Pennsylvania subject to suit in the courts of Pennsylvania by a non-resident, suing on a foreign cause of action, for a period of time longer than he would be subject to answer a like suit by a resident whose cause of action arose in Pennsylvania.

It is accordingly submitted that there was no compelling reason for the Courts below to disregard the settled policy of Pennsylvania in this case.

VI. Conclusion.

Pennsylvania allows anyone, resident or non-resident, to bring a wrongful death action within one year and a survival action within two years, but plays no favorites and applies the same rules to all alike.

In the present case petitioner is seeking in the Federal Court sitting in Pennsylvania not equal but more favorable treatment in respect of a cause of action arising in Alabama than a Pennsylvania resident would be entitled to receive in a Pennsylvania Court in respect of a like cause of action arising in Pennsylvania, and it is accordingly submitted that the judgment should be affirmed.

Respectfully submitted,

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APPENDIX.

STATUTES REFERRED TO IN RESPONDENT'S BRIEF.

PENNSYLVANIA STATUTES.

Wrongful Death Acts.

Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives may maintain an action for and recover damages for the death thus occasioned. (Act of April 15, 1851, P. L. 669, § 19, 12 P. S. § 1601.)

The persons entitled to recover damages for any injuries causing death shall be the husband, widow, children, or parents of the deceased, and no other relatives; and that such husband, widow, children or parents of the deceased shall be entitled to recover, whether he, she or they be citizens or residents of the Commonwealth of Pennsylvania, or citizens or residents of any other State or place subject to the jurisdiction of the United States, or of any foreign country, or subjects of any foreign potentate; and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without liability to creditors under the laws of this Commonwealth. If none of the above relatives are left to survive the decedent, then the personal representative shall be entitled to recover damages for reasonable hospital, nursing, medical, funeral expenses, and expenses of administration necessitated by reason of injuries causing death. (Act of April 26, 1855, P. L. 309, § 1; Act of June 7, 1911, P. L. 678, § 1; as amended by Act of April 1, 1937, P. L. 196, § 1, 12 P. S. (Supp.) § 1602.)

The declaration shall state who are the parties entitled to such action; the action shall be brought within one year after the death, and not thereafter. (Act of April 26, 1855, P. L. 309, § 2, 12 P. S. § 1603.)

Survival Act of July 2, 1937.

Executors or administrators shall have power, either alone or jointly with other plaintiffs, to commence and prosecute all actions for mesne profits or for trespass to real property, and all personal actions which the decedent whom they represent might have commenced and prosecuted, except actions for slander and for libels; and they shall be liable to be sued, either alone or jointly with other defendants, in any such action, except as aforesaid, which might have been maintained against such decedent if he had lived.

All such rights of action which were not barred by the statutes of limitation at the time of the death of decedent may be brought against his executors or administrators at any time within one year after the death of the decedent, notwithstanding the provisions of any statutes of limitations whereby they would have been sooner barred. (Act of June 7, 1917, P. L. 447, § 35 (b); Act of March 30, 1921, P. L. 55, § 1; Act of May 2, 1925, P. L. 442, § 1; Act of July 2, 1937, P. L. 2755, § 2, 20 P. S. Ch. 3, App. § 772.)

ALABAMA STATUTES.

Homicide Act.

Action for wrongful act, omission, or negligence causing death. A personal representative may maintain an action, and recover such damages as the jury may assess in a court of competent judisdiction within the State of Alabama, and not elsewhere for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his tes-

tator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence, if it had not caused death. Such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be maintained, though there has not been prosecution, or conviction, or acquittal of the defendant for the wrongful act, or omission, or negligence; and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions. Such action must be brought within two years from and after the death of the testator or intestate. (Tit. 7, Code of Ala. 1940, § 123.)

SURVIVAL ACTS.

All actions on contracts, express or implied; all personal actions, except for injuries to the reputation, survive in favor of and against the personal representatives. (Tit. 7, Code of Ala. 1940, § 150.)

No action abates by the death or other disability of the plaintiff or defendant, if the cause of action survive or continue; but the same must, on motion, within twelve months thereafter, be revived in the name of or against the legal representative of the deceased, his successor or party in interest; or the death of such party may be suggested upon the record, and the action proceed in the name of or against the survivor. (Tit. 7, Code of Ala. 1940, § 153.)

OPINION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10,796

MARGARET QUINN, ADMINISTRATRIX OF THE ESTATE OF JOHN M. QUINN, DECEASED, AND MARGARET QUINN, IN HER OWN RIGHT;

Appellant

v.

SIMONDS ABRASIVE COMPANY, SUCCESSOR TO ABRASIVE COMPANY OF PHILADELPHIA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued October 14, 1952

Before GOODRICH, MCLAUGHLIN and STALEY, *Circuit Judges*

OPINION OF THE COURT

(Filed October 21, 1952)

By GOODRICH, *Circuit Judge.*

This appeal raises three points. It is an action brought in a federal court in Pennsylvania for an alleged wrongful death in Ohio. The action was brought after one year but before two years had elapsed. The plaintiff claims that because of the construction by the Supreme Court of Pennsylvania of the 1937 Survival Statute, the Pennsylvania decision of Rosenzweig v. Heller, 302 Pa. 279 (1931) is not applicable. This point has already been con-

sidered by this court and decided against the argument of the plaintiff. Wells v. Simonds Abrasive Co., 195 F. 2d 814 (3d Cir. 1952) rehearing denied. We adhere to our former decision.

The second point raised is that Pennsylvania is refusing the full faith and credit required by the Constitution in closing the doors of its courts after one year. We are advised that this point is to be argued in the Supreme Court in Wells v. Simonds Abrasive Co., 52 Misc. Dkt., certiorari granted October 13, 1952. Until the Supreme Court tells us differently, however, we see no violation of full faith and credit here. The Pennsylvania statute is applicable to all plaintiffs whether they live in Pennsylvania or somewhere else. For a long time it has been thought that a state could control the time in which actions are to be brought locally providing there is no discrimination. That is this case.

Finally, the appellant urges that the case should be sent back to Ohio under Section 1404 (a) of the judicial code. Without being required to go so far as many courts have gone in the application of this section, it is sufficient here to point out (a) that the plaintiff's application for transfer was conditioned upon his losing the motion for summary judgment which his opponent had made; and (b) that while the plaintiff comes from Ohio, the defendant and its factory are located in Pennsylvania. There was no abuse of discretion by the district judge in denying the conditional motion to transfer.

The judgment is affirmed.